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In The

Supreme Court of the United States

MARSHALL STRICKLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. WHETHER THE FOURTH CIRCUIT ERRED IN AFFIRMING PETITIONER'S SENTENCE TO LIFE IMPRISONMENT IN A NARCOTICS CONSPIRACY CASE, PURSUANT TO 21 U.S.C. §841(b)(1)(C), BY HOLDING NO "SUBSTANTIAL RIGHT" OF PETITIONER WAS AFFECTED UNDER F. R. CRIM. P. 52(b) WHEN THAT SENTENCE PUNISHED PETITIONER FOR A CRIME NEVER SUBMITTED TO NOR FOUND BY THE JURY AND WAS BASED SOLELY ON THE TRIAL COURT'S DRUG QUANTITY FINDING ON A PREPONDERANCE OF THE EVIDENCE STANDARD IN VIOLATION OF PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN APPRENDI V. NEW JERSEY, 530 U.S. 466, 120 S. CT. (2000)?

II. WHETHER APPRENDI, SUPRA, APPLIES TO SENTENCING ENHANCEMENTS BY A TRIAL COURT WHICH SUBSTANTIALLY IMPACT AND, AGGRAVATE A DEFENDANT'S SENTENCE ABOVE THE BASE PENALTY THAT WOULD OTHERWISE EXIST AS A RESULT OF THE JURY'S VERDICT AND IF SO, WHETHER MCMILLAN V. PENNSYLVANIA, 477 U.S. 79 (1986) AND ALMENDAREZ-TORRES V. UNITED STATES, 523 U.S. 224 (1998), MUST BE OVERRULED AS IRRECONCILABLE WITH APPRENDI, SUPRA?

PARTIES TO THE PROCEEDINGS

Eugene Strickland, Tiffany Graham, Emily Chavis, Mickey Strickland, Robert Strickland, Leon Strickland, Mitchell Chavis, Travis Strickland and Patricia McGirt were Defendants-Appellants in the consolidated appeal before the Fourth Circuit. These parties are filing a separate Petition for Writ of Certiorari for review of the decision of the Fourth Circuit entered April 3, 2001.

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The April 30, 2001, opinion of the United States Court of Appeals for the Fourth Circuit denying Petitioner's request for rehearing en banc was unpublished and is reprinted in the Appendix (hereinafter "App.") hereto, p. 51-54. The April 3, 2001, opinion of the United States Court of Appeals for the Fourth Circuit is found at __ Fed. 3d __ (4th Cir 2001) and is reprinted at App. p. 1-32. The November 1, 1999, Judgment of the United States District Court for the Eastern District of North Carolina is reprinted at App. p.33-50.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this action issued on April 3, 2001, with rehearing en banc denied on April 30, 2001. The jurisdiction of this Court to review the judgment of that court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the Fifth and Sixth Amendments to the United States Constitution as well as 21 U.S.C. §841. The provisions of both Amendments and §841 are set out in the Appendix hereto, App. at 55-68.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

On October 27, 1998, the Grand Jury in the Eastern District of North Carolina handed down an indictment charging Marshall Strickland and three other defendants with a single count of conspiracy to possess with intent to distribute cocaine base ("crack") in violation of 21 U.S.C. §§841 and 846. Trial proceeded solely against Petitioner on February 1, 1999, a severance having been granted from one other defendant, another having not yet been arrested, and the third having pled guilty. This trial ended in a mistrial.

On March 24, 1999, a superceding indictment was filed, naming petitioner along with nine other defendants. On June 3, 1999, a second superceding indictment was filed, charging

these same defendants with a ten year conspiracy (1989-1999) under 21 U.S.C. §§841 and 846 and alleging individual counts, for several of the defendants, including Petitioner, for using or carrying a firearm during a drug-related offense pursuant to 18 U.S.C. §924(c). In addition, several other individual forfeiture counts and a count of maintaining a place for the purpose of manufacturing controlled substances were alleged against some of the defendants, but are not at issue in this Petition.

At trial, which lasted approximately three weeks, the Government presented the testimony of 25 witnesses. The jury returned a verdict of guilty as to all the defendants on the conspiracy count and as to several defendants, but not the Petitioner, on the §924(c) counts, this count having been dismissed by the trial court for insufficiency of the evidence. In addition, separate forfeiture proceedings were held, unrelated to this case, and certain property was ordered forfeited. Following sentencing hearings on November 1, 1999, all of the defendants were sentenced to long terms of imprisonment; specifically Petitioner was sentenced to 400 months incarceration. Petitioner timely appealed both his conviction and sentence to the United States Court of Appeals for the Fourth Circuit, which on April 3, 2001, affirmed his conviction and sentence as well as all of the other defendants. Petitioner, with his co-defendants, timely filed a Petition for Rehearing en banc, which was denied by order of the Fourth Circuit on April 30, 2001. Id. at 51-54.

B. THE FACTS

The Government's evidence established an extensive cocaine and cocaine base distribution scheme originating in Maxton, Robeson County, North Carolina, over the period 1989 to 1999. Evidence adduced from the Government's witnesses at trial suggested Marshall and Eugene Strickland were primary sources for these drugs, sold principally from three open-air locations in Robeson County - - at a well-known curve on North Carolina State Route 130 ("Deep Curve"); at "Mickey's Place" and the shop behind it; and at

Eugene Strickland's residence. App. at 5. The Fourth Circuit's opinion goes on to describe the Government's evidence as to the remaining defendants as follows:

> They were in turn supplied during part of the period by Tiffany Graham Emily Charity Chavis assisted Eugene Strickland in managing the money as well as in selling cocaine. Leon Strickland, Micky Strickland, Robert "Punch" Strickland, Mitchell Kelly Chavis, and Travis Strickland received cocaine from Eugene Strickland and Marshall Strickland and sold it on the street, mostly at the three locations in Robeson County. Patricia McGirt was the mother of Emily Charity Chavis and was present at times when Eugene Strickland sold cocaine. She also assisted Eugene Strickland and Emily Charity Chavis and others to purchase cocaine from one of Eugene Strickland's sources and hosted one of his sources at her home.

Id. at 5-6.

The Government's evidence at trial was from witnesses, nearly all of whom were involved in alleged drug transactions with one or more of the defendants in this case. Each of the Government's witnesses was vigorously and repeatedly cross-examined by counsel for Petitioner and other defendants both as to the time and place of events, the presence of differing defendants during alleged transactions, the amount of the transactions involved, prior criminal records, plea agreements with the Government, drug addiction and a myriad of other credibility diminishing circumstances.

Throughout his trial, Petitioner contested his participation in most of the narcotics transactions involved, alleged a public authority defense to many of the transactions, arguing he was working with the Drug Enforcement Agency of the United States Department of Justice and the Robeson County Sheriff's Department as an undercover agent during this period of time, and received an instruction on the public authority defense from the trial Judge. Id. at 83-84. In fact, the

evidence is clear Petitioner was working with the local drug task force during this time frame - the Government simply contended and the jury agreed, that he was not employed in that capacity as to at least some of the transactions at issue in this case.

Notwithstanding the existence of evidence supporting the public authority defense and all the credibility issues created by the joint defense cross-examination of all of the Government's witnesses, Petitioner was convicted on the conspiracy count. A §924(c) count was dismissed for insufficiency of the evidence, by the trial court, pursuant to F. R. Crim. P. 29.

Count 1 of the second superceding indictment charged Petitioner, and the other defendants, in the "manner and means" section of this conspiracy count, with obtaining "large quantities of cocaine". . . "[d]uring the course of the conspiracy, at least five (5) kilograms of cocaine and fifty (50) grams of cocaine base (crack) . . ." This indictment charged the defendants with conspiracy under 21 U.S.C. §841(a)(1); it specifically did not mention nor charge the defendants under the enhanced penalty provisions of § 841(b)(1)(a).

Furthermore, the trial court's instructions to the jury, consistent with Fourth Circuit precedent at that time, did not require the jury find any quantity of drugs as an element of the crime of conspiracy, nor did the trial judge refer to any quantity in his instruction, incorporate the indictment language of quantity into his instructions or submit any special interrogatory on quantity to the jury. As such, the jury's general verdict of guilty on the conspiracy count contained, as the Government was later to concede, no determination of drug quantity.

At sentencing, the trial court found Petitioner was accountable for 1,739.65 grams of cocaine and 17,424.15 grams of cocaine base for purposes of Guideline calculation. See Fourth Circuit Joint Appendix (J.A.) at 2330. Accordingly, Petitioner's base offense level was established as a 38, under U.S.S.G. § 2(D)1.1(a)(2), with the trial court then finding the enhanced penalty provisions of § 841(b)(1)(A) applicable due

to the quantity of drugs involved. Petitioner objected to this finding by the trial court, which mirrored the Presentence Report calculations. J.A. at 2339. As a result of the base offense level finding by the trial court, which issued on a preponderance basis, along with further findings of a special offense characteristic enhancement for possession of a firearm (+2) and an adjustment for role in the offense level increase (+4), Petitioner's total offense level was set at 42 with an imprisonment range of 360 months to life. App. at 45. Petitioner was subsequently sentenced to 400 months imprisonment. Id. at 35.

On appeal, Petitioner argued his sentence for conspiracy was improperly and unconstitutionally enhanced both by the quantity of drugs involved as found by the trial court and through the trial court's special offense characteristic and adjustment for his role in the offense findings. Specifically, Petitioner argued the jury was never instructed to find any amount of drugs, let alone the amounts necessary to enhance his sentence under § 841(b)(1)(A), beyond a reasonable doubt. Petitioner contended:

> "[w]hen a statutory sentencing factor," specifically drug quantity, increases the maximum sentence beyond the sentencing range that would otherwise be allowed by the jury's verdict, the factor is no longer simply a matter of sentencing, but an element of a different crime.

App. at 7.

Petitioner further contended:

> There is simply no question . . . the jury charge issued in this case did not require the jury to make any factual finding of the amount of narcotics involved; the jury verdict only required the defendant to be found guilty or not guilty as to Count 1 [the conspiracy count] with no special interrogatory attached . . .; and the ultimate finding against the Defendant of the amount of narcotics was made by the

trial judge at sentencing on a preponderance of the evidence standard alone.

Id.

Petitioner asserted that taking the issue of enhancing drug quantities from the jury denied him due process of law as guaranteed by the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment pursuant to this Court's decisions in Jones v. United States, 526 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

On appeal, the Fourth Circuit found that despite Petitioner's objection at sentencing to the trial court's drug quantity finding, review of the error at trial, to which there was no objection, would have to be through the lens of plain error under F. R. Crim. P. 52(b). App. at. 9.

In conducting its plain error review, the Fourth Circuit found "the jury was not, however, specifically directed to find drug quantities and the verdict was only a general verdict of guilt. Moreover, it is not clear from the record whether the jury was provided with a copy of the indictment [which it was not] or whether the drug quantities from the indictment were read to the jury [which they were not]". Id. at 10. On appeal, the Government conceded plain error was committed and the Fourth Circuit correctly went on to assume this to be so. Id. at 11.

However, the Fourth Circuit erred in then finding, that under plain error analysis, no "substantial right" of Petitioner was affected in this case because Petitioner could not "demonstrate that the jury would not have found, beyond a responsible doubt, that the defendants conspired to traffic in at least 5 kilograms of cocaine or 50 grams of crack." Id. at 15. Essentially, the Fourth Circuit placed the burden on Petitioner to prove the negative. Accordingly, the Fourth Circuit found that despite the lack of any jury instruction or finding on the quantity of evidence, the fact Petitioner's sentence was enhanced by 160 months above the statutory limit for a non-enhanced §841 conviction, and the fact this additional

punishment occurred as a result of an unconstitutional preponderance of the evidence finding by the trial court to which Petitioner objected, Petitioner simply did not meet his burden to prove a "substantial right" of his had been affected under Rule 52. Accordingly, the Fourth Circuit affirmed Petitioner's conviction and sentence, holding:

> We conclude, therefore, beyond a reasonable doubt, that had the quantities been submitted to the jury, the jury's verdict would have been the same.

App. at 19. (Emphasis added)

For the reasons which follow, this Petition for Writ of Certiorari must issue as the Fourth Circuit's judgment seriously and constitutionally misapplies this Court's decisions in Jones v. United States, supra, and Apprendi v. New Jersey, supra; erroneously declares that 160 months of additional imprisonment, determined under an unconstitutional burden of proof by an unconstitutional trier of fact, does not effect a "substantial right" of the Petitioner under Rule 52(b); and conflicts with multiple decisions from other United States Courts of Appeal on this most profound issue. In addition, to the extent this case may be deemed controlled by the Court's prior decisions in McMillan v. Pennsylvania, 477 U.S. 79 (1986) and Almendarez-Torres v. United States, 523 U.S. 224 (1998), those decisions are in direct conflict with the rationale supporting the Court's most recent decision in Apprendi, supra, and must be overruled. Finally, the trial court's determinations of a special offense characteristic enhancement for possession of firearms and an upward adjustment for role in the offense, which increased Petitioner's total offense level by four levels, likewise must be reversed as unconstitutionally found and ordered by the trial court in violation of the Apprendi rule.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE FOURTH CIRCUIT ERRED IN AFFIRMING PETITIONER'S SENTENCE TO LIFE IMPRISONMENT IN A NARCOTICS CONSPIRACY CASE, PURSUANT TO 21 U.S.C. §841(b)(1)(C), BY HOLDING NO "SUBSTANTIAL RIGHT" OF PETITIONER WAS AFFECTED UNDER F. R. CRIM. P. 52(b) WHEN THAT SENTENCE PUNISHED PETITIONER FOR A CRIME NEVER SUBMITTED TO NOR FOUND BY THE JURY AND WAS BASED SOLELY ON THE TRIAL COURT'S DRUG QUANTITY FINDING ON A PREPONDERANCE OF THE EVIDENCE STANDARD IN VIOLATION OF PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN APPRENDI V. NEW JERSEY, 530 U.S. 466, 120 S. CT. (2000)?

Prior to the time of Petitioner's trial, long standing law in the Fourth Circuit, as well as every Circuit in the country, was clear: "[b]ecause the amount of drugs [went] only to the sentence rather than to guilt, the quantity of drugs in an offense is not a substantive element of the crime which must be charged and proved at trial." United States v. Dorlouis, 107 F.3d 248, 252 (4th Cir. 1997). To sustain a conviction under 21 U.S.C. §841, the Government did not have to prove a specific quantity of drugs was involved because quantity was deemed a sentencing and not an elemental factor. United States v. Fletcher, 74 F.3d 49, 53 (4th Cir.) cert. denied, __ U.S. __, 117 S.Ct. 157 (1996). However, the doctrinal foundation behind this authority and its progeny was fully compromised by this Court's decisions in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215 (1999) and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

In Jones, supra, the Court construed the federal car-jacking statute, 18 U.S.C. §2119, "as establishing three separate offenses by the specification of distinct [penalty] elements, each of which must be charged by indictment, proven beyond a reasonable doubt and submitted to a jury for its verdict."

526 U.S. at __, 119 S. Ct. at 1228.[1] The Court highlighted, but did not resolve, what it called a grave and doubtful constitutional question, namely whether --

> Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment submitted to a jury, and proven beyond a reasonable doubt.

Id. at __, 119 S.Ct. at 1224 n.6. Instead, the Court, while noting that "prior cases suggest rather than establish this principle", id., concluded it was required to interpret §2119 to avoid the constitutional question and, as such, held that "serious bodily injury" was an element of a different substantive crime.

Subsequently, defendants in several circuits argued that Jones overruled prior decisions holding drug quantity is an element of sentencing under 21 U.S.C. §841 and not an element of the offense. These contentions were uniformly

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[1] The statute consisted at the relevant time of an unnumbered paragraph specifying several elements, including possession of a firearm and taking a motor vehicle, followed by three numbered subsections dealing with punishment and, in the case of the second and third, harm to the victim:

> "Whoever, possessing a firearm is defined in §921 of this title, takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force in violence or by intimidation, or attempts to do so, shall - - (1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in §1365 of this title) results, be fined under this title or imprisoned not more than 25 years or both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both."

The defendant was convicted under an indictment that made no reference to the statutes' numbered subsections and charged none of the facts mentioned in the latter two. The jury was instructed solely by reference to the first subsection. However, the District Court, at sentencing, noted the victim suffered serious bodily injury during the commission of the offense and imposed a twenty-five year sentence pursuant to the second subsection. The Ninth Circuit affirmed, agreeing these subsections described only sentencing factors and not elements of the crime.

rejected. See United States v. Thomas, 204 F.3d 381, 384 (2d Cir. 2000) (collecting cases).

However, "the landscape changed drastically" and, to the extent any dispute remains over the critical holding of Jones, supra, and the breadth of its doctrinal shift, all doubts were resolved in this Court's opinion in Apprendi, supra.

In Apprendi, a New Jersey statute classified the possession of a firearm for an unlawful purpose as a "second degree" offense. 530 U.S. at 469-70. The offense was punishable by imprisonment for "between 5 years and 10 years". Id. A separate statute provided for an "extended term" of imprisonment if the trial judge found by a preponderance of evidence that "(t)he defendant in committing the crime acted with the purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity". Id. The extended term of imprisonment authorized was for "between 10 and 20 years." Id.

Apprendi fired several shots into the home of an African-American family and made a statement that he did not want the family in his neighborhood because of their race. He was charged under the above-referenced New Jersey statute and pled guilty to the possession of firearm crime. At his sentencing hearing, the Trial Court found, by a preponderance of the evidence, the shooting was racially motivated and sentenced Apprendi to twelve years. On appeal, the New Jersey Supreme Court affirmed the conviction, finding the Due Process Clause did not require a bias finding to be proved to a jury beyond a reasonable doubt. 159 N.J.7, 731 A.2d 485 (1999).

This Court granted certiorari and reversed, holding the procedure used by the New Jersey courts was in violation of the Due Process Clause of the Fourteenth Amendment. The Court concluded "[t]he historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes

the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id. at 482-83. (emphasis in original). Where a "defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not - - at the moment the state is put to proof of those circumstances - be deprived of protections that have, until that point, unquestionably attached." Id. From these principles, the Court announced an unequivocal constitutional rule, first expressed in Jones, supra:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. With that exception we endorse the statement of the rule set forth in the concurring opinions in that case: "(I)t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Id. at 490 quoting Jones, 526 U.S. at 252-53 (opinion of Stevens, J.) and at 253 (opinion of Scalia, J.).

Applying this principle to Apprendi, the Court held the New Jersey procedure marked "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." Id. at 497. The Court specifically found the form of the New Jersey statute did not matter and neither did any elusive distinction between "elements" and "sentencing factors". Id. at 494. The Court determined the potential doubling of his sentence from 10 to 20 years, on the basis of a finding by the judge by a preponderance of the

evidence, created a differentiation in punishment "unquestionably of constitutional significance". Id. at 495.

Apprendi raises fundamental questions about the Federal Sentencing Guidelines process: what facts are appropriately characterized as sentencing facts? What facts are more appropriately characterized as elements of aggravated crimes? What limits exist to Congress' power to put a given fact in one category rather than the other? See United States v. Wilkes, 130 F. Supp. 2d 222, 230 (D. Mass. 2001).

For the reasons which follow, the Circuits have now uniformly held that under Apprendi, supra, "specific threshold drug [quantities] must be treated as an element of an aggravated drug trafficking offense", rather than as mere sentencing factors. United States v. Promise, __ F.3d __, (4th Cir., June 29, 2001)(en banc). See also, e.g. United States v. Fields, 242 F.3d 393, 395 (D.C. Cir. 2001); United States v. Duarte, 246 F.3d 56 (1st Cir. 2001); United States v. Doggett, 230 F. 3d 160, 164-65 (5th Cir. 2000), cert. denied, __ U.S. __, 121 S. Ct. 1152 (2001); United States v. Page, 232 F. 3d 536 (6th Cir. 2000); United States v. Nance, 236 F. 3d. 820, 824-25 (7th Cir. 2000); United States v. Aguayo-Delgado, 220 F. 3d 926, 933 (8th Cir.) cert. denied, __ U.S. __, 121 S. Ct. 600 (2000); United States v. Nordby, 225 F.3d 1053, 1058-59 (9th Cir. 2000); United States v. Hishaw, 235 F.3d 565, 574-75 (10th Cir. 2000); United States v. Rogers, 228 F.3d 1318, 1327 (11th Cir. 2000).

Petitioner was convicted of conspiracy to possess with intent to distribute cocaine and cocaine-base, in violation of 21 U.S.C. §846. The amount of drugs attributed to him was not found by the jury beyond a reasonable doubt. Instead, it was determined by the District Court under a preponderance of evidence standard at the sentencing hearing. Under this standard, the District Court determined the transaction involved more than 50 grams of crack cocaine. Based on its finding, the court sentenced Petitioner to a term of 400 months imprisonment under 21 U.S.C. §841(b)(1)(A).

The statutory framework involved in this case begins with §846, which provides the penalty for a conspiracy to commit a drug trafficking offense shall be the same as the penalty for

the offense that was the object of the conspiracy. The underlining offense is set out in §841(a)(1), which makes it unlawful to "manufacture, distribute, or dispense, or posses with intent to manufacture, distribute, or dispense, a controlled substance." §841(b)(1)(A)-(D), in turn, establishes the penalties applicable to a violation of §841(a)(1). These subsections establish that the penalties vary according to, inter alia, the quantity of the particular controlled substance at issue. For example, an individual who possess with intent to distribute an identifiable but unspecified quantity of a schedule I or II drug is subject to a term of imprisonment of no more than 20 years. See 21 U.S.C. §841(b)(1)(C). A sentence exceeding 20 years may only be imposed upon the additional finding that the offense involved a specific threshold quantity of the controlled substance.

In short, the drug quantity determination is critical to the statutory sentencing scheme in 21 U.S.C. §841. The structure of §841 is similar to that described by Justice Thomas in his concurrence to Apprendi, supra: "if the legislature defines some core crime and then provided for increasing the punishment of that crime upon a finding of some aggravating fact--of whatever sort--the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny, the aggravating fact is an element of the aggravating crime." 120 S. Ct. at 2368.

Section 841 clearly calls for a factual determination regarding the quantity of the controlled substance and, as found by every circuit to consider the issue, that factual determination significantly increases the maximum penalty from 20 years under §841(b)(1)(C) to life imprisonment under §841(b)(1)(A). Thus, in light of Apprendi, supra, it is beyond peradventure that, in drug cases under 21 U.S.C. §§841 and 846, before a defendant can be sentenced to any of the progressively higher statutory maximums based on progressively higher quantities of drugs, the Government must state the drug type and quantity in the indictment, submit the required evidence to the jury and prove the

relevant drug quantity beyond a reasonable doubt. Promise, supra; United States v. Fields, 242 F.3d at 395-96; United States v. Doggett, 230 F.3d at 165.

In the case at bar, the Government did not come close to satisfying the requirements of Apprendi, supra. Although the second superceding indictment specified quantities of drugs alleged in count 1, the trial court's instructions to the jury made no reference to the drug quantity alleged nor did it incorporate language from the second superceding indictment. Based on this instruction, the jury could convict Petitioner on the basis of any unspecified quantity of drugs The verdict form provided only for a finding of "guilty" or "not guilty" on each count, with no finding of amount. Without a jury instruction dealing with or a special finding on drug quantity, the jury simply did not have to make any determination as to whether the Petitioner conspired to distribute 50 grams or more of cocaine base or 5 kg or more of cocaine.

In sum, because it is undisputed that the quantity of controlled substances involved was a decisive factor in Petitioner's sentence, the Fourth Circuit found, and the Government conceded, the District Court's sentence enhancement under §841(b)(1) contravened Apprendi, supra.

It is at this point in the analysis, where the Fourth Circuit went seriously astray. Reviewing the error committed by the District Court under the plain error standard of Fed. R. Crim. P. 52(b), the Fourth Circuit then found this plain error did not affect the "substantial rights" of the Defendant. It also found that even if a "substantial right" was affected the error should not be recognized. Both of these decisions seriously undermine this Court's decision in Apprendi, supra, deprecate the importance of the critical Fifth and Sixth Amendment rights at issue and conflict with decisions from several other circuits.

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

This Rule requires (1) the demonstration of an "error" (2) that was "plain" and (3) that affected the "substantial rights" of the defendant. United States v. Olano, 507 U.S. 725 (1993). In addition, even where a defendant satisfies the requirements of the Rule, lower federal courts are left with the discretionary decision of whether or not to recognize the error. Id. at 736. In this regard, plain error should be recognized when it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id.

In this case, the Grand Jury indicted and the petit jury convicted Marshall Strickland of a single offense--conspiracy to possess with intent to distribute a quantity of cocaine and cocaine-base. Although the second superceding indictment included an amount in the "manner and means" section of the indictment, the petit jury that tried Petitioner never considered the question of drug quantity, let alone finding beyond a reasonable doubt that Strickland conspired to distribute more than 50 kg of cocaine or 50 grams of cocaine-base. Accordingly, the Fourth Circuit properly concluded the District Court erred by arrogating to itself the quantity determination and sentencing Strickland to a prison term of 400 months.

Yet, stunningly, the appellate court holds this error did not affect Strickland's substantial rights--even when it resulted in Petitioner receiving a sentence of over 13 more years in prison than the statute he was convicted of violating permits. The Court's refusal to recognize this plain error constitutes a "serious misjudgment" that "reflects a failure to appreciate fully both the nature of the error at issue here and the impossibility of overlooking such an error without jeopardizing the fairness, integrity and reputation of judicial proceedings." United States v. Promise, __ F.3d. at __ (Motz, J., dissenting).

The error at issue in this case is a sentencing error only in the sense that the remedy is vacating Petitioner's sentence and remanding for re-sentencing. Id. However, "unlike the usual sentencing error, the root of this error is not a simple failure to calculate the correct sentence for the crime for which the defendant has been charged and convicted. Rather, the error here rests on the District Court's decision to sentence [Strickland] for a crime for which he was never [convicted]." Id. (footnotes omitted).

The statute upon which Petitioner was tried and convicted provides the maximum sentence for conspiracy to possess with intent to distribute an unquantified amount of cocaine and cocaine-base is no more than 20 years imprisonment. 21 U.S.C. §841(b)(1)(C). Yet, the District Court, sentenced Strickland to 400 months imprisonment pursuant to §841(b)(1)(A) for the more serious crime of conspiracy to possess with intent to distribute a specific threshold quantity of cocaine (in excess of 5 Kg.) and cocaine-base (in excess of 50 grams).

The imposition of such a sentence is "antithetical to our system of justice." United States v. Promise, supra (Motz, J., dissenting). It deprived Strickland of two "constitutional protections of surpassing importance--due process of law and the right to trial by jury." Apprendi , supra. Taken together, these rights guarantee, if nothing else, "the right to have a jury determine those facts that determine the maximum sentence the law allows." 530 U.S. at 499(Scalia, J. concurring).

The jury's role in determining guilt and innocence in criminal prosecutions has always been thought to be the most fundamental aspect of American justice. See Alshuler and Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 870 (1994). The right to a trial by jury originally developed in England as a check against the Crown and was expressly provided for in the English Bill of Rights. See Note, Lewis v. United States: A Requiem for Aggregation, 46 Cath. U.L. Rev. 1057, 1063 (1997). Juries have historically provided critical protection to criminal

defendants, which led to the incorporation of the right to a trial by jury in the Constitution.

In order for a defendant to be convicted in a criminal case, the jury must find him guilty "beyond a reasonable doubt". This exacting standard requires the fact-finder have an extremely high level of certainty before a guilty verdict may be returned. In so doing, this demanding standard reduces the risk of convictions resting on factual error and ensures a defendant is not deprived of his liberty unless the fact-finder is certain the defendant committed the crime charged. See In re Winship, 397 U.S. 358 (1970); Coffin v. United States, 156 U.S. 432 (1895).

Yet, in this case, Strickland was deprived of this most fundamental of rights. Strickland was properly indicted and convicted of a different (lesser) crime than the one for which he was punished. Here, using the convictions under §841(a)(1) and §846, with its twenty year maximum sentence, as the basis for imposing on Strickland a 33+ year sentence for an aggravated drug offense is precisely the same as using a defendant's indictment and conviction on the charge of manslaughter, carrying a maximum penalty of 5 years, as the basis for imposing a life sentence for murder. See United States v. Promise, __ F.3d at __ (Motz, J., dissenting). This, the United States Constitution expressly prohibits.

An error affects a substantial right under Rule 52(b) when it "affected the outcome of the district court proceedings." United States v. Olano, 507 at 734. It is beyond cavil that imposing additional years of imprisonment beyond that authorized by a jury's verdict affects a defendant's substantial rights and the Fourth Circuit's determination to the contrary in this case is in direct conflict with multiple decisions from other circuits and with the Fourth Circuit's own subsequent opinion in United States v. Promise, supra. See United States v. Westmoreland, 240 F.3d 618, 635 (7th Cir. 2001); United States v. Fields, 242 F.3d at 397; United States v. Page, 232 F.3d at 543; United States v. Nordby, 225 F.3d at 1061; United States v. Barajas-Nunez, 91 F.3d 826, 833 (6th Cir. 1996).

The Fourth Circuit refused to recognize error in this case because it believed, with clear hindsight, that Strickland was not innocent of the crime for which he was sentenced. The court found the Government presented "overwhelming" evidence at trial establishing his guilt on the aggravated drug crime. "But correcting plain error does not depend on a defendant's innocence." United States v. Promise, __ F.3d at __. (Motz, J., dissenting). Indeed, this Court has expressly instructed to the contrary--an appellate court "should" exercise it's discretion to correct any plain error prejudicing a defendant's substantial rights, which "seriously affects the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." Olano, 507 U.S. at 736-37 (emphasis added)(internal quotation marks omitted). See also United States v. Floresca, 38 F.3d 706, 713 n. 18 (4th Cir. 1994)(en banc)([T]he term "miscarriage of justice" is not the equivalent of" miscarriage of result"). Nothing could more seriously affect the fairness, integrity and public reputation of a judicial proceeding than sentencing a defendant for a crime for which he has never been convicted. In this circumstance, the Fourth Circuit's error results in the imposition of a sentence which is simply not authorized by law. United States v. Page, supra; United States v. Williamson, 183 F.3d 458, 464 (5th Cir. 1999). As Judge Motz eloquently analyzed in her dissent in Promise, supra:

> Returning to the defendant indicted and convicted of manslaughter, but illegally sentenced to life imprisonment for murder--I hope and trust no member of this Court would "decline" to notice this "sentencing" error, even where the evidence adduced at trial indicated the defendant's actions likely fit the statutory definition of murder. No such result could be regarded as fair, nor could "judicial proceedings" that would permit such a sentence to stand instill "public confidence." See Olano, 507 U.S. at 736. For an appellate court to "decline to notice" such an error would constitute a serious abuse of discretion,

> producing a true "miscarriage of justice." Id. Declining to notice the error in this case gives rise to the same fundamental unfairness, engenders the same lack of confidence in judicial proceedings, results in the same miscarriage of justice, and constitutes the same grave abuse of discretion.

United States v. Promise, __ F.3d at __ (Motz, J., dissenting).

What the Fourth Circuit has done in this case is simply substitute its own judgement of what verdict a petit jury could, would or should have reached if the petit jury were presented with the correct charge. This might be an efficient scheme for the disposition of criminal cases designed for a society prepared to leave this judgement to the Government, but the Sixth Amendment does not provide this alternative. See Apprendi, 530 U.S. at 498 (Scalia, J., concurring). Sentencing a defendant for a crime for which he was never convicted by a petit jury is an error that always affects the fairness, integrity and public reputation of the judicial process. And, harmless error can not save the day because there is no proper verdict upon which it can act. The Fifth and Sixth Amendments to the Constitution mandate this conclusion and, in holding otherwise, the Fourth Circuit has taken "a step toward disregarding altogether the right ... to trial by petit jury in favor of judicial imposition of a sentence for whatever crime an appellate court believes that a defendant has committed." United States v. Promise, __ F.3d at __ (Motz, J., dissenting).

Furthermore, recognizing the importance of the vital constitutional rights at issue and noticing the error in this case will not result in a costly and onerous new trial. The error can be rectified by simply re-sentencing Strickland to the maximum term allowed by the statute for the offense for which he was convicted. The defendant would not be set free, the Government would not have to undertake a new trial and the costs of noticing this fatal error are minimal. They certainly "pale in comparison to the damage done to the integrity of judicial process in failing to correct it." Id.

In addition, even assuming arguendo, the essence of harmless error analysis is applicable here, the issue of the amount of narcotics attributable to Petitioner and his co-defendants were seriously contested at trial and the credibility of all of the Government's witnesses was repeatedly attacked and impeached. Everyone of the Government's eyewitnesses were vigorously crossed examined as to their bias, self-interest, agreements with the Government, credibility and the transactions to which they testified. E.g., Testimony of Hubert Deese, J.A. at 715-20; Jerry Porter, id. at 762-86; Terry Deese, id. at 820-64; 870-883; Mitchell Harris, id. at 901-21; Sean Jones, id. at 943-65; Tony McGirt, id. at 983-1004; Christina Scott, id. at 1053-83; Ron Miles, id. at 1131-65; Brenda Barefoot, id. at 1209-59; Johnny Lee Scott, id. at 1280-91; Jerry Scott, id. at 1301-10; James Jacobs, id. at 1512-1603; 1607-16; Jacquelin Sainvil, id. at 1718-69; Jimmy Jacobs, id. at 1786-1805; and Ronnie Strickland, id. at 1892-1910.

In support of it's argument for harmless error analysis, the Fourth Circuit relied on three cases: United States v. Swatzie, 228 F.3d 1278 (11th Cir. 2000); United States v. Nealy, 232 F.3d 825 (11th Cir. 2000) and United States v. Mojica-Baez, 229 F.3d 292 (1st Cir. 2000). All three are easily distinguishable.

In Swatzie, supra, the defendant was convicted and sentenced for possession of cocaine-base and cocaine with intent to distribute in violation of §841(a). On appeal, defendant argued the trial court erred in sentencing him to life when the jury's verdict was ambiguous as to what form of cocaine he possessed and the quantity of drugs was not found by the jury, but by the trial court in violation of Apprendi, supra. The 11th Circuit assumed the Apprendi error was plain, but found it did not affect defendant's substantial rights because "no serious dispute" existed defendant possessed at least 5 grams of cocaine-base, enough for the increased statutory maximum. Specifically, Swatzie was arrested in a sting and led authorities to 100-plus grams of cocaine and 20-grams of cocaine-base in his house. Furthermore, he admitted to possession of the cocaine-base. Finally, he offered no

evidence to dispute amount or possession and "did not seek to discredit the sources of the evidence against him." Id. at 1282-83.

Similarly, in Nealy, supra, the amount of narcotics involved was uncontested at trial and sentencing. Furthermore, the amount, which was more than sufficient to support defendant's sentence, was found in defendant's backpack, which also contained defendant's identification card. Finally, a law enforcement officer testified at trial the defendant admitted at the scene the cocaine-base was his. 232 F.3d at 830.[2]

In the case at bar, it goes without saying that the primary witnesses against the defendant were drug dealers whose primary motivation involved testimony against the defendants in order to secure sentencing or re-sentencing bargains, not security guards. The evidence on the fact in

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[2] The Fourth Circuit's citation to United States v. Mojica-Baez, supra, is equally unavailing. In that case, the District Court failed to submitted to the jury a question of fact regarding whether a firearm possessed by defendants during a robbery was a semi-automatic assault weapon which, if found, would increase the penalty beyond the statutory maximum otherwise prescribed. In analyzing whether Apprendi error affected defendant's "substantial rights", the First Circuit considered "what prospects there were that submission of the question to the jury would have resulted in a different outcome, keeping in mind the higher standard of proof required before a jury." 2000 WL 1211013 at *12.

In Mojica-Baez, supra, defendants, dressed in security guard uniforms, held up the Loomis Fargo and Company Armored depot in Puerto Rico. They took the guards captive.

On appeal, the First Circuit found defendants had not met their burden of showing prejudice under the plain error test because among the evidence presented was uncontradicted evidence the robbers twice told the security guards they had AK-47 rifles, which can operate as a semi-automatic or fully automatic weapon. Id. In addition, AK-47 rounds were found at one of the defendant's home, one of the robbers claimed his weapon could shoot through cement, which an AK-47 round is capable of, and one of the Loomis Fargo guards testified at trial that one of the robbers was carrying an AK-47. Id.

Given this evidence by non-interested law enforcement officers, who were eyewitnesses to and victims of the robbery, the First Circuit simply found no miscarriage of justice occurred in the case because the trial court's error did not affect the outcome of the proceedings. Id.

question, drug quantity, was highly contested as it related to transactions, amounts and the presence or lack thereof of individual defendants.

In the case at bar, the facts are far different than these cases since there is no admission by the Defendant, the amounts in differing transactions were contested at trial, and the credibility of the Government's witnesses was consistently and thoroughly at issue. Whether Petitioner was involved in a transaction or not was time and place dependent, and Petitioner was not found in physical possession of narcotics upon any search or arrest. See United States v. Westmoreland, supra; United States v. Noble, 246 F.3d 946 (7th Cir. 2001).

Finally, this case is not governed by Neder v. United States, 527 U.S. 1 (1999). In Neder, supra, this Court affirmed defendant's conviction for violating various federal tax, mail and wire fraud statutes. At his trial, the element of materiality was not submitted to the jury. Rather, the judge made a finding that the evidence established materiality. After trial, but before Neder's appeal, this Court ruled in United States v. Gaudin, 515, U.S. 506 (1995), that it was error not to submit the issue of materiality to the jury and affirmed reversal of Gaudin's conviction. Neder argued his conviction should likewise be reversed. This Court disagreed. It acknowledged the jury had not rendered a complete verdict because the error in the jury instruction prevented it from making a finding of materiality. 527 U.S. at 11. Nonetheless, the Court "recognized that 'most constitutional errors can be harmless'" and proceeded to apply a harmless-error analysis. Id. quoting Arizona v. Fulminate, 499 U.S. 279, 306 (1991). Since the error at issue in Neder, "did not vitiate all of the jury's findings," the Court concluded a structural error had not occurred and affirmed Neder's conviction. Id. at 11, quoting Sullivan v. Louisiana, 508 U.S. 275, 281 (Rehnquist, C.J., concurring). The Court declared:

> "The error at issue here–a jury instruction that omits an element of the offense–differs markedly from the constitutional violations we have found to defy

> harmless-error review. Those cases, we have explained, contain a 'defect affecting the framework within which the trial proceeds rather than simply an error in the trial process itself.'... Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for guilt or innocence."

Id. at 8-9 quoting Fulminate, 499 U.S. at 310.

In relying on Neder, in the case at bar, the Fourth Circuit fundamentally misunderstood the constitutionally crucial difference between the two cases. In Neder, supra, the defendant was sentenced for the crime for which the jury convicted him. Here, Petitioner was not convicted of the crime for which he was sentenced. Harmless error review is unavailable because there is no jury verdict in this case under §841(b)(1)(A), the offense for which Petitioner was sentenced. There is only a jury verdict under §841(a)(1), which is now recognized as a wholly separate offense. Thus, unlike Neder, supra, no jury verdict under the appropriate statute exists upon which harmless error analysis can operate.

With regard to the lack of jury verdict, this Court has stated:

> There being no jury verdict of guilty beyond a reasonable doubt, the question whether the same verdict of guilt-beyond-a-reasonable-doubt could have rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury would have surely found Petitioner guilty beyond a reasonable doubt–not that the jury's findings of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's

> action or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilt.

Sullivan v. Louisiana, 508 U.S. 275, 288 (1993). The same is true here. Without a verdict of guilty under §841(b)(1)(A), it is impossible to determine whether the error was harmless in terms of its effect on the actual verdict because there is no actual verdict under that section.

In addition, unlike Neder, supra, in the case at bar, the wrong entity, the judge, made the finding of guilt under the inapplicable statute. Rose v. Clark, 478 U.S. 570, 578 (1986), explains that where the wrong entity finds the defendant guilty, harmless error analysis is unavailable:

> We have stated that a "trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict... regardless of how overwhelming the evidence may point in that direction. This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. Where that right is altogether denied, the State can not contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty."

Finally, an appellate court' weighing of the evidence that the jury did not consider is improper where the missing element is central to the offense. Neder makes clear that its scope is limited, but the opinion does fully explicate the nature of the Rule' boundaries. See Neder, 527 U.S. at 17 n.2; Id. at 33 (Scalia, J. dissenting). Where the element the jury failed to consider is central to the existence of an offense, as quantity is here, the omission of that element simply falls outside of Neder's scope.

For all of the above reasons, the Fourth Circuit' opinion to the contrary seriously misapplies this Court' opinion in Apprendi, supra, and is unfaithful to the constitutional predicates of that decision; erroneously declares that 160

months of additional imprisonment for a different crime than that with Petitioner was convicted, determined under an unconstitutional burden of proof by the wrong trier of fact does not affect " substantial right" under Rule 52(b); and conflicts in both regards with the decisions from other circuits. The Fourth Circuit, on the basis of what it believes the jury would have done if the Government had tried Petitioner for a more serious crime, affirms the sentence Marshall Strickland received for that more serious crime even though he was never tried or convicted of that crime. This the Constitution does not allow and a Writ of Certiorari should issue to the Fourth Circuit, reviewing its fundamentally erroneous decision.

II. WHETHER APPRENDI, SUPRA, APPLIES TO SENTENCING ENHANCEMENTS BY A TRIAL COURT WHICH SUBSTANTIALLY IMPACT AND AGGRAVATE A DEFENDANT'S SENTENCE ABOVE THE BASE PENALTY THAT WOULD OTHERWISE EXIST AS A RESULT OF THE JURY'S VERDICT AND, IF SO, WHETHER MCMILLAN V. PENNSYLVANIA, 477 U.S. 79 (1986) AND ALMENDAREZ-TORRES V. UNITED STATES, 523 U.S. 224 (1998), MUST BE OVERRULED AS IRRECONCILABLE WITH APPRENDI, SUPRA?

The Government must prove every fact of a crime beyond a reasonable doubt before a defendant may be convicted of that crime. See In re Winship, 397 U.S. at 364. ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). See also Mullaney v. Wilbur, 421 U.S. 684 (1975).

However, this Court, has rejected the notion that whenever a State links the "severity of punishment" to the "present or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 214 (1977).

Extending the Patterson rationale, in a closely-divided decision, this Court decided in McMillan v. Pennsylvania, 477 U.S. 79 (1986), that a distinction exists between the elements of an offense, which must be proved beyond a reasonable doubt, and "sentencing factors", which need not. See Apprendi, 120 S.Ct. at 2360 (noting that McMillan was the first case to recognize this distinction). McMillan involved a constitutional challenge to Pennsylvania's Mandatory Minimum Sentencing Act which required that a mandatory minimum sentence of five years imprisonment be imposed on anyone convicted of certain enumerated felonies if the judge found by a preponderance of the evidence the defendant "visually possessed a firearm" during the commission of the offense. In upholding this provision's constitutionality, the Court held the statute "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of ...a firearm. The statute gives no impression of having been tailored to permitted the visible possession finding to be a tail which wags the dog of the substantive offense" 477 U.S. at 88. Accordingly, the Court ruled Pennsylvania could permissively take one factor traditionally considered by sentencing judges-the instrumentality used to commit the offense-and state the weight the factor was to receive. Id. at 89-90.

In 1998, the Court, in Almendarez-Torres v. United States, 523 U.S. 224 (1998), upheld a statute empowering the judge, rather than the jury, to decide whether defendant was a recidivist, even though it resulted in the increase of the defendant's sentence above the maximum allowed under the jury's verdict. Id. The court held that the factor of recidivism is a traditional sentencing factor and need not be proven beyond a reasonable doubt. Id. at 243. Almendarez-Torres arguably extended McMillan, for McMillan involved a mandatory minimum because of the sentencing factor while Almendarez-Torres involved an increased sentence as a result of the previous conviction.

Following Apprendi, supra, federal courts have repeatedly relied on McMillan and Almendarez-Torres, supra

to hold that if a District Court's factual findings do not result in any enhancement that exceeds the statutory maximum for the crime charged and convicted, Apprendi is irrelevant. Specifically, every circuit to rule on the question has declined to hold Apprendi applies to Guideline enhancements that result in a sentence within the statutory range. See, e.g. United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001); United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001); United States v. Williams, 235 F.3d 858, 862-63 (3d Cir. 2000); United States v. Kinter, 235 F.3d 192, 198-201 (4th Cir. 2000); United States v. Keith, 230 F.3d 784, 786-87 (5th Cir. 2000); United States v. Munoz, 233 F.3d 410, 413-14 (6th Cir. 2000); United States v. Aguayo-Delgado, supra; United States v. Heckard, 238 F.3d 1222, 1235-36 (10th Cir. 2001); United States v. Nealy, supra.

The Fourth Circuit, consistent with its decision in Kinter, supra, held the enhancements found by the trial judge in this case, by a preponderance of the evidence, which increased Petitioner's base offense level from 38 to 42 and, thus, added many months of imprisonment to Petitioner's sentence, were constitutional. To the extent McMillan, supra, and Almendarez-Torres, supra, are the vehicles driven by the lower federal courts generally, and in this case specifically, to unduly restrict Apprendi's reach to sentencing enhancements that do not exceed the statutory maximum, but which substantially increase the defendant's sentence, Petitioner respectfully requests both decisions be overruled as inconsistent with Apprendi, supra, and the Fifth and Sixth Amendment rights that form it's foundation.

Apprendi establishes the Constitution entitles defendants to heightened protection from judicial fact finding at sentencing. 120 S.Ct. at 2391 (O'Conner, J., dissenting). If a fact at sentencing has a substantial and aggravating impact on the defendant's sentence, in that it increases the base penalty which would otherwise be established without the existence of that fact, it must be considered an "element" of the offense. Due process, and the right to a jury trial, pivot on the impact the determination of a particular historical fact will have on the outcome. See Specht v. Patterson, 286 U.S. 605 (1967).

> If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact-of whatever sort, including the fact of a prior conviction-the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

Apprendi, 120 S. Ct. at 2368-69 (Thomas, J., concurring).

Any limitation on judicial fact finding only for determinations that could increase the prescribed maximum statutory penalty is artificial and finds no home in the text of the Constitution. If the Fifth and Sixth Amendments entitle Defendants to heightened protection from judicial sentencing for crimes a jury did not convict them of, then such protections should extend to every factual determination (of the crime) the judge makes that can and does aggravate defendant's crime. These protections are not just triggered by the "maximum" sentence for, as a practical matter, defendant's sentence can still be substantially increased (as was the case at bar) as a result of findings made by judges, rather than juries, using a mere preponderance of the evidence standard under the Federal Sentencing Guidelines.

Thus, federal sentencing hearing are now dominated with the absurd result of judges being allowed to continue to make findings of fact that substantially increase the length of the defendant's sentence allegedly within the prescribed statutory maximum penalty, with no historical or constitutional origin for that demarcation line. If a defendant's constitutional rights are violated when a judge (rather than a jury) determines the existence of a certain fact by a preponderance of the evidence (as opposed to beyond a reasonable doubt), those rights are infringed when the determination made concerns a fact which increases the sentence, and consequently the stigma, regardless of whether the sentence remains below the statutory maximum. Apprendi logically extends to sentences imposed below the maximum because the defendant possess

a liberty interest in any term of sentence whether or not it is above or below the statutory maximum.

Furthermore, the Guidelines "have the force and effect of laws." Apprendi, 120 S.Ct. at 2380 n.11 (Thomas, J., concurring)(quoting Mistretta v. United States, 488 U.S. 361 (1989)(Scalia, J., dissenting)). The Guidelines despite their name, do not "guide"; they direct a district court. Thus, because the maximum set by the sentencing guidelines may not be exceeded by trial judges, the Guidelines constitute a legally binding enactment in a manner indistinguishable from congressional statutes. Indeed, the sentencing ranges is promulgated by the Commission are incorporated into the federal statute by 18 U.S.C. § 3553(b).

In the end, Apprendi, supra, applies with equal force to sentencing enhancements as it does to drug quantity. Both involve the finding of historical facts in the case and an increase in potential punishment (or, as in this case, inflicted punishment) as a result. To the extent McMillan, supra, and Almendarez-Torres, supra, suggest a result to the contrary and insulate a trial judge's findings which dramatically increase the defendant' punishment, these cases must be overruled. "[S]tare decisis is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision." Payne v. Tennessee, 501 U.S. (1991). "[W]hen governing decisions are unworkable or badly resolved, '[t]he Court has never felt constrained to follow precedent.'" 501 U.S. at 827 quoting Smith v. Allwright, 321 U.S. 649 (1944). Stare decisis is not a doctrine designed to forever preclude a change in the law; it is not designed to perpetuate error. The doctrine simply does not impose upon contemporaneous courts a disabling notion of disability at self-correction for nothing is settled until it is settled right.

In the case at bar, the trial court enhanced Petitioner's base offense level two levels for possession of a firearm during the commission of an offense. It did so despite the fact it dismissed the §924(c) count against Petitioner for insufficiency of the evidence at the close of the Government's case. No jury was asked to or ever ultimately returned a

verdict on the existence of this fact, but the trial judge nonetheless made the determination it existed and increased Petitioner's punishment accordingly. This decision was affirmed by the Fourth Circuit without even the cover of harmless error analysis on the pure grounds Apprendi does not apply in these circumstances.[3] This decision is utterly irreconcilable with Apprendi, supra. To the extent McMillan, supra, and Almendarez-Torres, supra suggest otherwise they must be overruled. In either event, a writ of certiorari should issue to answer this critical question of Apprendi's reach to Guideline enhancements.

CONCLUSION

The issues presented in this case merit consideration by this Court. There are no collateral issues which will complicate the Court's treatment of the case and lengthen the proceedings. The case at bar presents a series of critical questions concerning both the nature and extent of this Court's opinion in Apprendi, supra, its underlying Fifth and Sixth Amendment foundations and its application to Federal Sentencing Guidelines issues; the definition of "substantial right" under F. R. Crim. P. 52(b); and finally whether overrule of McMillan v. Pennsylvania, supra, and Almendarez-Torres, supra is mandated so as to clarify the true constitutional meaning and breath of Apprendi, supra. Accordingly, Petitioner respectfully requests the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit issue to review the decision below.

Respectfully submitted this the 30th day of July, 2001.

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[3] The same is true for the role in the offense adjustment although here the court at least employed some semblance of harmless-error analysis.

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4855

EUGENE STRICKLAND,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4856

MARSHALL STRICKLAND,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4857

TIFFANY GRAHAM
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4858

EMILY CHARITY CHAVIS, a/k/a Pooh,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4859

MICKEY STRICKLAND,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4860

ROBERT M. STRICKLAND, a/k/a Punch,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4861

LEON STRICKLAND,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4862

MITCHELL KELLY CHAVIS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4863

TRAVIS STRICKLAND,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4864

PATRICIA MCGIRT,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Wilmington.
James C. Fox, Senior District Judge.
(CR-98-82)

Argued: January 26, 2001
Decided: April 3, 2001
Entered: April 3, 2001

Before NIEMEYER and MICHAEL, Circuit Judges, and James H. MICHAEL, Jr., Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Senior Judge Michael joined. Judge Michael wrote an opinion concurring in part and concurring in the judgment.

COUNSEL

ARGUED: Robert John McAfee, MCCOTTER, MCAFEE & ASHTON, New Bern, North Carolina; Felix Thomas Holt, III, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina; Vaughan Sharp Winborne, Jr., Raleigh, North Carolina; Hart Miles, Jr., Raleigh, North Carolina, for Appellants. Mary Jude Darrow, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Richard B. Glazier, BEAVER, HOLT, RICHARDSON, STERNLICHT, BURGE & GLAZIER, P.A., Fayetteville, North Carolina, for Appellant Marshall Strickland; Gregory J. Ramage, Raleigh, North Carolina, for Appellant Graham; Mark E. Edwards, EDWARDS & FLEMMING, P.L.L.C., Durham, North Carolina, for Appellant Emily Chavis; James M. Ayers, II, New Bern, North Carolina, for Appellant Mickey Strickland; Robert L. Cooper, COOPER, DAVIS & COOPER, Fayetteville, North Carolina, for Appellant Mitchell Chavis; Carlton M. Mansfield, Lumberton, North Carolina, for Appellant Travis Strickland; David K. Williams, Jr., Greensboro, North Carolina, for Appellant McGirt. Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

OPINION
NIEMEYER, Circuit Judge:

On appeal from their convictions for conspiracy to traffic in drugs and related offenses, the ten defendants in this case challenge their sentences under Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), maintaining that they were improperly denied the right to have the jury find drug quantities and other sentence-enhancing facts. Various defendants also assign error based on (1) the use of evidence from an illegal search, (2) a second trial after a mistrial in violation of the Double Jeopardy Clause, (3) the failure to sever several of the defendants' cases, (4) the insufficiency of evidence, (5) the admission of irrelevant and prejudicial evidence, (6) prosecutorial misconduct, (7) the rejection of the "public authority" defense, and (8) the attribution of excessive drug quantities for sentencing purposes. For the reasons that follow, we reject each of these contentions and affirm.

I

The Strickland family organization was engaged in extensive cocaine and cocaine base ("crack cocaine") distribution in Maxton, Robeson County, North Carolina, over the period from 1989 to 1999. Eugene Strickland and Marshall Strickland were primary sources for cocaine and cocaine base sold principally from three open-air locations in Robeson County -- at a well-known curve on North Carolina State Route 130 ("Deep Curve"); at "Mickey's Place" and the shop behind it; and at Eugene Strickland's residence. They were in turn supplied during part of the period by Tiffany Graham. Emily Charity Chavis assisted Eugene Strickland in managing the money as well as in selling cocaine. Leon Strickland, Mickey Strickland, Robert "Punch" Strickland, Mitchell Kelly Chavis, and Travis Strickland received cocaine from Eugene Strickland and Marshall Strickland and sold it on the street, mostly at the

three locations in Robeson County. Patricia McGirt was the mother of Emily Charity Chavis and was present at times when Eugene Strickland sold cocaine. She also assisted Eugene Strickland and Emily Charity Chavis and others to purchase cocaine from one of Eugene Strickland's sources and hosted one of his sources at her home.

Ten members of the conspiracy were tried in this case, and all were convicted, but more than 15 other related cases were separately prosecuted against others. While the court granted motions for judgment of acquittal in favor of Eugene Strickland and Marshall Strickland (Counts II and III) for firearms offenses, the jury convicted all defendants of conspiracy to engage in drug trafficking, in violation of 21 U.S.C. §§ 846 & 841(a)(1), and Eugene Strickland and Travis Strickland of one count each for firearms offenses.

The district court sentenced Eugene Strickland to life imprisonment plus 60 months for his firearm count; Travis Strickland to 188 months imprisonment plus 60 months for his firearm count; Marshall Strickland to 400 months imprisonment; Tiffany Graham to 292 months; Emily Charity Chavis, 292 months; Mickey Strickland, 235 months; Robert "Punch" Strickland, 292 months; Leon Strickland, 292 months; Mitchell Kelly Chavis, 262 months; and Patricia McGirt, 63 months. Each of the defendants was also sentenced to a five-year term of supervised release and ordered to pay a fine. These appeals followed.

II

The defendants' most significant argument is that their sentences for drug-trafficking crimes were improperly enhanced by the quantity of drugs involved. They argue that they were not charged with the amount of drugs that would enhance their sentences and that the jury was not instructed to find the enhanced amounts beyond a reasonable doubt. Rather, the enhancements were found by the sentencing judge as part of the sentencing process. More specifically they contend that

> [w]hen a statutory "sentencing factor", specifically drug quantity, increases the maximum sentence beyond the sentencing range that would otherwise be allowed by the jury's verdict, the factor is no longer simply a matter of sentencing, but an element of a different crime.

Directing their argument to the circumstances in this case, the defendants contend:

> There is simply no question that the indictment failed to set out, with any specificity, the amount of drugs the defendant was charged with under § 841; the jury charge issued in this case did not require the jury to make any factual finding of the amount of narcotics involved; the jury verdict only required the defendant to be found guilty or not guilty as to Count 1 with no special interrogatory attached, (J.A. at 2107); and the ultimate finding against the defendant of the amount of narcotics was made by the trial judge at sentencing on a preponderance of the evidence standard alone.

The defendants assert that taking the issue of enhancing drug quantities from the jury denied them the due process guaranteed by the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment. They base their arguments on two recent Supreme Court decisions, Jones v. United States, 526 U.S. 227 (1999), and Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). The defendants claim that they preserved this error at trial through their generalized challenge to drug quantities made during sentencing. In the alternative, they argue, the error amounted to a "plain error" that we should notice and correct under the analysis of United States v. Olano, 507 U.S. 725 (1993).

The government contends that the Apprendi defense cannot apply to all of the defendants, because several were sentenced to a term of imprisonment under 240 months, the lowest maximum amount for conspiring to traffic in cocaine and cocaine base in violation of 21 U.S.C. § 846. See 21 U.S.C. §§ 846, 841(b)(1)(C). As to those defendants for whom the argument can be made that their sentences were enhanced beyond 240 months because of the quantity of drugs involved, the government concedes, based on our no-longer viable decision in United States v. Angle, 230 F.3d 113 (4th Cir. 2000), that the district court erred under Apprendi and that the error was plain. The Angle decision, however, has since been vacated by our order to rehear that case en banc. Rather than challenging whether there was error, the government argues that, because the error was not preserved, it can only be reviewed under plain-error principles. Under those principles, the defendants whose sentences were enhanced beyond 240 months because of the quantity of drugs involved could not take advantage of the error because it did not affect their substantial rights. The government states that "overwhelming evidence established that the conspiracy involved far greater quantities of crack cocaine than those required to support the defendants' sentences."

We begin with the necessary observation that none of the defendants in this case objected to the indictment for its failure to charge drug quantities; none requested an instruction that the jury be required to find drug quantities; and none requested a special interrogatory on drug quantities or objected to a general verdict. Indeed, during sentencing, while some of the defendants objected to the attribution of some drug quantities, none challenged the conclusion that the government proved the minimum amount of drugs to give rise to a life sentence under § 841(b). See 21 U.S.C. § 841(b)(1)(A) (providing that trafficking in 5 kilograms of cocaine or 50 grams of crack may be punished by up to life imprisonment). Thus, because

the antecedents for making an Apprendi argument were not preserved during trial -- indeed Apprendi had not yet been decided-- we can only review the defendants' objections on appeal for plain error under Federal Rule of Criminal Procedure 52(b). See United States v. Lewis, 235 F.3d 215, 218 (4th Cir. 2000).

Rule 52(b) provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

This rule requires (1) the demonstration of an "error" (2) that was "plain" and (3) that affected the "substantial rights" of the defendant. See Olano, 507 U.S. at 731-32; Lewis, 235 F.3d at 219; United States v. Bowens, 224 F.3d 302, 315 (4th Cir. 2000); United States v. Hastings, 134 F.3d 235, 239 (4th Cir. 1998). Even after the defendants satisfy the requirements of Rule 52(b), the court is left with the discretionary decision of whether to notice or recognize the error. But in the exercise of that discretion, a court may notice or recognize a plain error only when it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Bowens, 224 F.3d at 315 (quoting Olano, 507 U.S. at 736) (internal quotation marks and other citations omitted).

Because of the procedural course of this case, there might not even be an error under Apprendi. The defendants were charged with a single count of conspiracy to traffic in cocaine and cocaine base over a period of 10 years. The second superseding indictment charged, "During the course of the conspiracy, at least five (5) kilograms of cocaine and fifty (50) grams of cocaine base (crack) were possessed and distributed." And at trial, the evidence presented to the jury, as is detailed below, demonstrated amounts far exceeding the amounts charged. Indeed, the very first transaction, of probably hundreds during the course of the conspiracy,

involved the sale of one-and-a-half kilograms of cocaine base, 30 times the minimum amount required to expose members of the conspiracy to a life sentence. See 21 U.S.C. § 841(b)(1)(A)(iii). The presentence reports in this case indicate that the conspiracy involved over 38 kilograms of cocaine base. Finally, the district court's instructions to the jury suggested that what was charged had to be proved beyond a reasonable doubt to find guilt. The court stated:

> Unless the government proves beyond a reasonable doubt that the Defendants have committed every element of the offenses with which they have been charged, you must find the Defendants not guilty of those offenses.
>
> * * *
>
> The Defendants are not on trial for any act or conduct or offense not alleged in the indictment.

Moreover, when instructing the jury about how they might find the intent requirement, the court stated that the jury could consider "the purity of the controlled substance, the quantity of the controlled substance, the presence of equipment used in processing or sale of the controlled substances, and large amounts of cash or weapons." On this record, we might well be able to conclude that defendants have not established any Apprendi error because they failed to show that the issue of drug quantity was not submitted to the jury. See United States v. Richardson, 233 F.3d 223, 230-31 (4th Cir. 2000). The jury was not, however, specifically directed to find drug quantities and the verdict was only a general verdict of guilt. Moreover, it is not clear from the record whether the jury was provided with a copy of the indictment or whether the drug quantities from the indictment were read to the jury. Although the defendants have the burden of establishing each element of plain error, see Hastings, 134 F.3d at 239, our doubt about whether the

jury did find drug quantities compels us to consider the next two prongs of the plain-error analysis.

Because our Angle opinion controlled at the time that the government submitted its brief on appeal, the government conceded that plain error was committed and argues only the effect of the error. But with Angle vacated, we are left to determine whether the district court's sentences for violations of 21 U.S.C. § 841, including sentences over 240 months, based on judicial findings of drug quantities, amounted to error under Apprendi.

In Apprendi, the issue presented to the Supreme Court was whether the sentencing judge could enhance a sentence when the conduct constituted a "hate crime" -- i.e., one committed "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." Apprendi, 120 S. Ct. at 2351 (quoting N.J. Stat. Ann. § 2C:44-3(e)). The defendant had fired several bullets at the house of an African-American family that had recently moved into a previously all-white neighborhood. After the defendant pled guilty to a firearm possession count, for which the maximum sentence was ten years imprisonment, the sentencing court enhanced that maximum sentence by two years, relying on a New Jersey statute that permitted enhancement when the offense was racially motivated. The court thus sentenced the defendant to a twelve-year term, which was longer than the ten-year maximum for firearm possession. The Supreme Court of the United States reversed, concluding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. Because the defendant had not admitted his racial bias during the plea agreement and the state had not proved that bias to a jury beyond a reasonable doubt, the maximum punishment that could be imposed for firearm possession was ten years. While the Court in

Apprendi recognized that it had earlier, in Jones v. United States, only "expressed serious doubt concerning the constitutionality of allowing [any] penalty-enhancing findings to be determined by a judge by a preponderance of the evidence," 120 S. Ct. at 2353, the Court in Apprendi applied the principle but limited its application to factual determinations "that increase[ ] the penalty for a crime beyond the prescribed statutory maximum," id. at 2362-63 (emphasis added).

At the core of both Jones and Apprendi was a recognition that a legislature may prescribe both the elements of the offense and factors for sentencing, and that under our system, trial responsibility is divided between the jury, which finds guilt or innocence, and the court, which imposes the sentence. See Jones, 526 U.S. at 232; Apprendi, 120 S. Ct. at 2358; see also Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (observing that it is "normally a matter for Congress" to distinguish between elements of the crime and factors for sentencing); McMillan v. Pennsylvania, 477 U.S. 79, 85 (observing that a "legislature's definition of the elements" of an offense is "usually dispositive"). In Jones, the Supreme Court continued also to approve the different burdens of proof in finding guilt and in finding factors that may enhance a sentence. See Jones, 526 U.S. at 248. The constitutional issue arises not from the distinct roles of judge and jury, nor from the different burdens of proof, but from the functional blurring of the roles. See id. at 239-48.

Tools of statutory interpretation thus may resolve the preliminary question of whether Congress (or a legislature) intended a factor to be an element of the offense or a sentencing factor. See, e.g., Almendarez-Torres, 523 U.S. at 238. When the statute is ambiguous and is susceptible of two constructions -- one in which the statutory factor might be an element of the offense and the other where it might be merely a sentencing enhancement -- then we resolve the ambiguity by adopting the interpretation that avoids the

Sixth Amendment issue of denying a right to jury trial on an element of the offense. See Jones, 528 U.S. at 239, 251-52. In Jones, however, the Court noted that "some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors," id. at 232, and in those cases, Congress' intent should be controlling, at least as a matter of statutory interpretation.

In this case, it is arguable as a matter of statutory interpretation that Congress' intent in 21 U.S.C. § 841 is clear. The statute sets forth the offense in 21 U.S.C. § 841(a) under the heading "Unlawful Acts," and the sentences in § 841(b) under the heading "Penalties." One can conclude from a "straightforward" reading that the factors in subsection (b) are therefore all sentence enhancements. The fact that the sentencing range is fractured into sub-ranges, depending on the type of drug involved and its amount serves precisely the same function as do the similar sub-ranges found in the Sentencing Guidelines. See Almendarez-Torres, 523 U.S. at 229-35 (finding, as a statutory matter, that an analogous enhancement was a sentencing factor). Indeed, the Almendarez-Torres Court repeatedly referred to 21 U.S.C. § 841 as an example of a statute where the statutory enhancements to increase the penalty were sentencing factors. See 523 U.S. at 230, 236.

But both Jones and Apprendi make clear that even if a statute is unambiguous, the constitutional question of whether the legislature improperly took from the jury its right to decide an element of the offense, by including it as a sentencing factor, still must be addressed. See Jones, 526 U.S. at 232, 248; Apprendi, 120 S. Ct. at 2360 ("constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense"). Arguably, however, Apprendi makes Congress' intent dispositive on the constitutional issue by requiring only that facts which increase the penalty beyond the statutory maximum be decided by the jury. But this still may not resolve whether 21 U.S.C. § 841(b), with its sub-ranges of sentences,

impermissibly takes away from the jury factfinding on an element of the offense, an issue that we are scheduled to address in our rehearing of Angle. We need not even confront the issue today, however, because the further analysis of defendants' claim under plain-error principles -- whether the error affected the defendants' substantial rights -- leads us to a more certain, and therefore satisfactory, determination on the defendants' Apprendi claim.[1]

The substantial rights that defendants claim were affected in this case are the rights to be given notice of drug quantities in the indictment and to have these quantities determined by the jury, rather than the court, under the reasonable-doubt standard.

First, the assertion that the indictment failed to give the defendants notice is meritless. The indictment charged the defendants with a conspiracy continuing over the course of a ten-year period, beginning in 1989, to traffic in cocaine and crack cocaine. The indictment states that "at least five (5) kilograms of cocaine and fifty (50) grams of cocaine base (crack) were possessed and distributed" during the conspiracy. These allegations adequately gave the defendants notice, and their rights in this regard were not adversely affected.[2]

The question, however, of whether the failure to have the jury decide drug quantities affected the defendants' substantial rights requires some analysis. The substantial

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[1] Because Travis Strickland, Mickey Strickland, and Patricia McGirt were sentenced to less than 240 months imprisonment, the lowest maximum sentence for any violation of 21 U.S.C. § 841(a) based on cocaine trafficking, they cannot attempt to assert any Apprendi argument. As we have held, "[b]ecause the sentencing enhancements . . . did not extend [the defendant's] sentence beyond the maximums prescribed for his offenses by the substantive provision of the United States Code, the government was not required to submit to a jury and prove beyond a reasonable doubt the facts relevant to those enhancements." United States v. Kinter, 235 F.3d 192, 202 (4th Cir. 2000).

[2] In their Reply Brief, the defendants concede that the indictment was "sufficient."

rights requirement is not satisfied by merely showing that the court did not submit an element of the offense to the jury; the error must have caused prejudice. See Olano, 507 U.S. at 734; Hastings, 134 F.3d at 241. And unlike the harmless-error test, imposed by Federal Rule of Criminal Procedure 52(a), under which the government bears the burden of showing that an error did not result in any prejudice, the defendant bears the burden of showing prejudice under the plain-error test of Federal Rule of Criminal Procedure 52(b). See id.; see also Hastings, 134 F.3d at 240. The defendants must thus demonstrate that the jury would not have found, beyond a reasonable doubt, that the defendants conspired to traffic in at least 5 kilograms of cocaine or 50 grams of crack. See United States v. Mojica-Baez, 229 F.3d 292, 307 (1st Cir. 2000) (considering, in determining whether substantial rights were affected, "what prospects there were that submission of the question to the jury would have resulted in a different outcome, keeping in mind the higher standard of proof required before the jury"); see also United States v. Swatzi, 228 F.3d 1278, 1282-83 (11th Cir. 2000); United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000) (noting that even a preserved Apprendi error can be harmless if "the record does not contain evidence that could rationally lead to a contrary finding with respect to drug quantity").

While the harmless error analysis imposes the burden of showing an absence of prejudice on the government and the plain-error analysis under Rule 52(b) imposes the burden of showing prejudice on the defendant, in both cases the prejudice turns on whether substantial rights of the defendant were affected. To this extent, the analysis in Neder v. United States, 527 U.S. 1 (1999), applying principles of harmless error, proves instructive. In Neder, the trial court failed to instruct the jury on materiality, an element of the offense for which the defendant was charged. As a consequence, the jury necessarily made no finding on materiality. The Supreme

Court held that this error was subject to a harmless-error analysis under Rule 52(a) and that an error is harmless when "it appears `beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at 15 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Articulating the particular test for when an omitted instruction on an element of an offense is harmless, the Court stated:

> Where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.

Id. at 17. The Court observed that an application of this test will often require the reviewing court to conduct a thorough examination of the record to determine, beyond a reasonable doubt, whether the jury verdict would have been the same absent the error. If the reviewing court concludes that the verdict would not have been the same, "for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," the error would not be harmless. Id. at 19.

In this plain-error case before us, the defendants have not met their heavy burden, as we easily conclude, beyond a reasonable doubt, that the jury verdict would have been the same had the jury been asked specifically to find whether the conspiracy in this case involved more than 5 kilograms of cocaine or 50 grams of crack cocaine. No defendant suggested that these amounts had not been proven at trial, and we conclude that the uncontroverted evidence demonstrated amounts hundreds of times more than the amounts charged. The government points to the following evidence, as is confirmed in the record, which demonstrates the large amount of drugs involved:

Jacquelin Sainvil identified Tiffany Graham, Eugene Strickland, Marshall Strickland and Mickey Strickland as all participating in crack cocaine deals in the summer of 1997. The first transaction he testified about being present for involved one-and-a-half kilograms of crack cocaine, which Tiffany Graham delivered to Eugene and Marshall Strickland, and Mickey Strickland tested. This transaction alone surpasses the statutory requirement of 50 grams of crack cocaine required to support a life sentence.

Ron Miles, who only sold crack cocaine testified that he sold nine-ounce quantities of crack cocaine to Mickey Strickland numerous times, "sometimes twice a week, sometimes more.["] Miles also sold similar quantities to Eugene and Marshall Strickland. Miles testified that Emily Charity Chavis was present for one 33-gram deal, and in fact, gave him the money for the crack that she and Eugene Strickland purchased. Miles recounted selling quarter ounces of crack on one or two occasions to Mitchell Kelly Chavis. Miles also sold crack to Leon Strickland on one occasion.

Christina Scott identified Eugene Strickland, Marshall Strickland, Robert Neil Strickland ("Punch"), and Emily Charity Chavis as individuals who sold her crack cocaine over a number of years. Christina Scott purchased $80 to $100 quantities of crack cocaine "about everyday" behind "Mickey's trailer" from 1994 through 1997, from Eugene and Marshall Strickland, and "Punch" (Robert Strickland).

Brenda Barefoot testified that she purchased cocaine from Eugene, Marshall and Leon Strickland, "so many times over the last couple years that I was there, I can't remember." She also admitted purchasing crack cocaine from Robert "Punch" Strickland and Travis Strickland on "numerous occasions." Barefoot recalled purchasing a $20 piece of cocaine from Mitchell Kelly Strickland (Chavis) on one occasion.

Deputy Steve Lovin stopped Leon Strickland and James Dallas Jacobs in August, 1998, and observed Leon Strickland place a quantity of crack cocaine under the car in which he was seated.

At "Mickey's residence," James Dallas Jacobs purchased crack cocaine from "Marshall or Eugene or Leon . . . Travis and Punch and Kelly," and one or two times from Mickey Strickland. James Dallas Jacobs sold crack cocaine at "Mickey's" that "Leon or Eugene or Marshall," provided to him.

James Dallas Jacobs testified that he met Tiffany Graham during the summer of 1997, when she tried to sell four and one-half ounces of crack cocaine to Eugene Strickland.

In early January, 1999, Ronnie Strickland, a cocaine user and seller, made three purchases of crack cocaine from the "Strickland boys" (Leon Strickland and James Dallas Jacobs sold the crack to them, after he contacted Eugene and Marshall Strickland regarding making his buys) in cooperation with the [Robeson County Sheriff's Department].

(Emphasis added). In short, the evidence establishing the threshold amounts of cocaine and crack cocaine for life imprisonment sentences was not only overwhelming, but also uncontested. We conclude, therefore, beyond a reasonable doubt, that had the quantities been submitted to the jury, the jury's verdict would have been the same.

In a similar vein, Marshall Strickland argues that the district court's findings pursuant to the Sentencing Guidelines to enhance his sentence violated the principles of Jones and Apprendi. During sentencing, the district court found that Marshall Strickland possessed a firearm during the commission of an offense and enhanced his base offense level two levels under U.S.S.G. § 2D1.1(b)(1). The court also found that Marshall was "an organizer, leader, manager, or supervisor" and enhanced his offense level another two levels. These enhancements increased Marshall Strickland's maximum punishment from 327 months imprisonment to life imprisonment, and his actual sentence of 400 months imprisonment was 73 months more than would have been permissible without the enhancements. But again, we have held that "the current practice of judicial factfinding under the [Sentencing] Guidelines is not subject to the Apprendi requirements -- at least so long as that factfinding does not enhance a defendant's sentence beyond the maximum term specified in the substantive statute." Kinter, 235 F.3d at 201. In this case, by reason of the analysis we have already made -- i.e., that Marshall Strickland was charged with conspiracy to traffic in more than 50 grams of crack cocaine and that overwhelming evidence supported this charge -- Marshall's maximum statutory sentence was life imprisonment. See 21 U.S.C. § 841(b)(1)(A). Thus, the enhancement from 327 months to 400 months was within the prescribed statutory maximum. See Apprendi, 120 S. Ct. at 2362-63.

III

Leon Strickland contends that his consent to the search of his mobile home at the time of his arrest was not voluntary and that therefore the guns and drugs seized during that search should have been suppressed. Even though Leon Strickland agrees that he and his wife voiced consent to a search of their home, he challenges the voluntariness of the consent in the context of the circumstances. He states that the essence of his argument was accurately captured by the district court's summary:

> I think it's common sense if somebody comes into your home and there's six men or four men in your house at 6:30 in the morning and you're handcuffed and they've got fire- arms and they say "Can I search your house?," I bet you 99 out of 100 are going to say "yes sir."

Leon Strickland adds that when law enforcement officials received their consent to search his residence, "they had already explicitly shown the Strickland family that their authority extended to every part of the Stricklands' persons and home. Clearly, any consent . . . was simply an acquiescence to a claim of lawful authority." Nonetheless, the district court found that Strickland's consent to the search was voluntary and thus did not suppress the evidence.

Our review of Leon Strickland's claim, which is essentially a factual challenge, is for clear error. See Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985); United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996) (en banc).

The historical facts themselves are not disputed. When officers sought, at approximately 6:30 a.m. on March 30, 1999, to arrest Leon Strickland pursuant to an arrest warrant, they were unable to arouse Strickland from his bed, despite their pounding on the front door and on the

outside of Strickland's mobile home. After repeated efforts, the officers broke open the door and entered, one officer going to the right and handcuffing Leon Strickland's wife, Teresa, and the other going to the left and handcuffing Leon Strickland. After the two were brought from their bedrooms to the living room and seated, Leon was read his Miranda rights. Teresa was told that she was not under arrest and that cuffing her was for the safety of all present. One of the officers asked Leon whether he "ha[d] any weapons in the residence," whether there were "any guns in the residence." He pointed to the bedroom, and the officers recovered several firearms that were located in the closet and under the bed. The officers then asked Leon whether there were any more controlled substances (other than the marijuana that they had discovered on the counter when they entered the home), and Leon said no. When one officer asked, "Do you mind us looking?", Leon said that the officers could search the trailer. To assist, he provided them with the location of the key to the safe. Teresa also gave her consent to the search. During their search, the officers recovered cocaine.

On these facts, the district court found that the officers' entry into the trailer was legal, and that their initial protective sweep of the trailer to protect the safety of the officers was valid under Maryland v. Buie, 494 U.S. 325 (1990). The court also found that the seizure of marijuana located on the counter in plain view was legal. Finally, the court found that the more detailed search of the mobile home, during which cocaine was discovered, was conducted pursuant to the voluntary consent of both Leon Strickland and his wife. Leon challenges only the voluntariness of this consent in the context of the circumstances.

Other than the force required to effect his arrest, Leon can point to no fact of coercion that rendered his consent involuntary. The officers used force to enter, to make the arrest, and to secure the premises, including handcuffing Leon. The evidence indicates, however, that

they accomplished their task in a most professional manner. For example, when they handcuffed Teresa, they advised her that she was not under arrest and that the handcuffs were "just procedural." They offered to permit Teresa to have someone pick up her child to avoid the emotional stress of the situation, an offer that Teresa accepted.

The officers also brought a blanket to Leon after he complained of being cold, as he was wearing only his underwear. Although these accommodations were not required, they evidence a situation in which will could be freely exercised. Indeed, neither Leon nor Teresa complained during the arrest and the subsequent searches about any overbearing conduct.

Accordingly, we conclude that the district court did not err in finding the consent given by Leon and Teresa Strickland to be voluntary.

IV

Marshall Strickland contends that the Double Jeopardy Clause bars his retrial in this case after his first trial ended in a mistrial. Pursuant to the first indictment in this case, which named only four defendants, the trial of Marshall Strickland alone commenced on February 1, 1999. At that trial, Marshall Strickland's theory was that he was serving as a government informant during the drug transactions at issue. Despite several requests that he made before trial for records of his activities as an informant, the government did not produce any. It also did not acknowledge that any existed until after a trial had begun and Strickland's counsel had already made representations to the jury that no such records existed. When a witness acknowledged their existence, Strickland moved for a mistrial, and the district court granted the motion. Strickland then filed a motion to dismiss the indictment against him on double jeopardy grounds, a motion that the district court denied.

On appeal, Marshall Strickland does not challenge the general principle that he cannot claim double jeopardy when he is given a second trial pursuant to his own motion. See United States v. Ham, 58 F.3d 78, 83 (4th Cir. 1995). Rather, he argues that the circumstances in this case fall within an exception to the general rule, as stated in Oregon v. Kennedy, 456 U.S. 667 (1982), which held that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded and aborting the first on his own motion." Id. at 676; see also United States v. Johnson, 55 F.3d 976, 978 (4th Cir. 1995). Our review of the record, however, reveals no evidence that the prosecutor's conduct was deliberate and intended to provoke a mistrial. See Kennedy, 456 U.S. at 676 (emphasizing that the prosecutor must intend to provoke a mistrial). The district court was able to assess the prosecutor's demeanor when she offered her explanation for failing to provide the evidence, and the court made the factual finding that the prosecutor had not acted in bad faith, which we must accept unless such finding is clearly erroneous. See Johnson, 55 F.3d at 978. Moreover, as the government points out, whether the failure to disclose the evidence constituted a Brady violation was far from clear; it certainly was not egregious. The transcript reveals that the prosecutor herself was clearly surprised by her witness's reference to reports, and she promptly suggested having the matter clarified by further questioning of the witness. This evidence alone supports the district court's conclusion that the government did not act deliberately to goad the defendant by intentionally concealing discoverable materials.

Accordingly, we affirm the district court's rejection of Marshall Strickland's double jeopardy claim.

V

Mitchell Kelly Chavis and Robert "Punch" Strickland contend that the district court abused its discretion in denying their motions to sever their cases from those of the other defendants. They argue that the magnitude of the evidence against them was small in comparison to that against the others, and that the jury would have difficulty in distinguishing among the various defendants.

Generally, "individuals indicted together should be tried together." United States v. Brugman, 655 F.2d 540, 542 (4th Cir. 1981). And defendants may be charged with the same indictment if they are alleged to have "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). It is not an abuse of discretion, therefore, to follow this general rule of trying together those indicted together unless the moving defendant is able to show prejudice. See United States v. Akinkoye, 185 F.3d 192, 197 (4th Cir. 1999).

While the jury did hear a substantial amount of evidence directed specifically against other members of the conspiracy, there was ample evidence, as we indicate below, directed specifically to Marshall Kelly Chavis and Robert "Punch" Strickland to support their individual convictions. And there is no evidence that the jury had difficulty distinguishing between the defendants. The district court instructed the jury to consider each defendant separately, and the prosecutor outlined separately the evidence against each defendant in closing argument. "A defendant is not entitled to severance merely because separate trials would more likely result in acquittal, or because the evidence against one defendant is not as strong as that against the other." Akinkoye, 185 F.3d at 197 (citation omitted).

In short, these defendants have simply not demonstrated the prejudice required to justify reversing the district court's ruling.

VI

Eugene Strickland, Tiffany Graham, Patricia McGirt, Mickey Strickland, Mitchell Kelly Chavis, Robert "Punch" Strickland, and Travis Strickland challenge the sufficiency of evidence of conspiracy upon which the jury's verdicts were based. Their arguments center principally around the contentions that (1) each defendant's connection with the conspiracy was too attenuated, and (2) rather than proving a single, unified conspiracy, the government actually proved multiple conspiracies.

To prove a conspiracy under 21 U.S.C. § 846, the government must prove (1) an agreement between two or more persons to engage in conduct that violates a federal drug law, (2) the defendant's knowledge of the conspiracy, and (3) the defendant's knowing and voluntary participation in the conspiracy. See United States v. Wilson, 135 F.3d 291, 306 (4th Cir. 1998). When reviewing the evidence that resulted in a conviction, we take the evidence in the light most favorable to the government to determine whether the jury's verdict was supported by substantial evidence. See Glasser v. United States, 315 U.S. 60, 80 (1942). Once a conspiracy has been proved, the evidence need only establish a slight connection between any given defendant and the conspiracy to support conviction. See United States v. Brooks, 957 F.2d 1138, 1147 (4th Cir. 1992). Indeed, a defendant need not have knowledge of all his co-conspirators, or of all of the details of the conspiracy, and he may be convicted despite having played only a minor role. See United States v. Burgos, 94 F.3d 849, 861 (4th Cir. 1996) (en banc).

Our review of the record reveals ample evidence to support the jury's convictions against these defendants. Witnesses identified Eugene Strickland and Marshall Strickland as the suppliers of those defendants who sold cocaine at "Deep Curve" on State Route 130 in Robeson County, at "Mickey's Place," and at Eugene Strickland's

residence. The witnesses described open-air drug markets at these locations where customers could drive up, negotiate the purchase, and complete the transaction within minutes. Mickey Strickland, Mitchell Kelly Chavis, Robert "Punch" Strickland, and Travis Strickland were each identified by witnesses as cocaine sellers at these open-air drug markets. Tiffany Graham was identified by two witnesses as a cocaine supplier to Eugene and Marshall Strickland. Patricia McGirt's participation involved assisting other members in the conspiracy. She went with other conspirators to obtain drugs from Florida and told them that it was easy to do. She made her residence available to Eugene Strickland on more than one occasion to sell drugs. Indeed, evidence was also presented that McGirt herself had sold cocaine.

Eugene Strickland contends additionally that the government did not prove a single, unified conspiracy, but rather actually proved multiple conspiracies. See generally United States v. Leavis, 853 F.2d 215, 218 (4th Cir. 1988). "Whether there is a single conspiracy or multiple conspiracies depends upon the overlap of key actors, methods, and goals." Id. Eugene, however, has failed to demonstrate that the jury's finding of a single conspiracy was unreasonable or irrational. There was evidence that tied him to purchases of large quantities of cocaine and crack cocaine for the purposes of supplying street level drug dealing throughout the period of the conspiracy. The facts establish not only constancy of the locations of operation, but also of the methods used and most of the personnel involved. The evidence clearly supported a finding that Eugene Strickland was involved in a single, overall venture extending over a long period of time to deal in drugs. Cf. United States v. Bowens, 224 F.3d 302, 308 (4th Cir. 2000) (holding that it was not error for the district court to refuse to instruct the jury on multiple conspiracies where the evidence supported a single conspiracy).

VII

Leon Strickland contends that the district court abused its discretion in admitting in evidence marijuana that was seized at his mobile home when he was arrested. He contends that he was not charged with distributing marijuana and that the marijuana was therefore both irrelevant and prejudicial and should have been excluded under Federal Rule of Evidence 403.

While the evidence of marijuana was not directly relevant to Leon's charges of cocaine dealing, it was seized from his mobile home when he was arrested, and certainly could have been considered, as are guns, as evidence to support his involvement generally in the "drug trade." Cf. United States v. Ward, 171 F.3d 188, 195 (4th Cir. 1999). If this were a case where the evidence of cocaine trafficking was marginal or doubtful, Leon Strickland's argument might have carried greater weight. But in the context of the overwhelming evidence that Leon Strickland dealt in large amounts of cocaine and crack cocaine over many years, there can be no doubt that the admission of evidence that Leon Strickland was also involved in a small amount of marijuana was not prejudicial.

VIII

Emily Charity Chavis contends that her due process rights were violated by misstatements of the prosecutor. During closing argument, the prosecutor recited the evidence against each defendant, and when the evidence was summarized against her, the prosecutor stated that a witness had stated Chavis was selling cocaine from Eugene Strickland's trailer. The evidence referred to actually showed that Chavis was "around Eugene maybe when he was doing his deals" and that "most of the time Eugene maybe would give her his money."

The government contends that by taking the money from Eugene during the course of transactions, Chavis was participating in the sales. Additionally, the government points to the fact that evidence, other than that the testimony referenced by the prosecutor, indicated that Chavis sold cocaine at Eugene Strickland's trailer.

Chavis raised a timely objection, which the district court overruled. Accordingly, our review is for abuse of discretion. If the prosecutor's statements were in fact misstatements, a point that is not certain, there is no indication that the remarks prejudiced Chavis. First, Chavis objected to the statements, highlighting her challenge before the jury and permitting the jury to consider the evidence that they heard. Second, there was plenty of evidence that Chavis sold cocaine generally. Third, the challenged statements were brief. And finally, there is no indication that the prosecutor was deliberately attempting to mischaracterize the evidence. Accordingly, we reject Chavis' challenge based on this alleged misconduct.

IX

Mickey Strickland contends that because he was a paid informant and confidential source of information during a portion of the conspiracy, he could not have been found guilty of conspiracy. Correspondingly, he also argues that the district court improperly denied him the public authority defense.

It is well settled, of course, that government agents participating in "sting" operations are not part of the conspiracy. See United States v. Hayes, 775 F.2d 1279, 1283 (4th Cir. 1985); see also Fed. R. Crim. P. 12.3. We have reviewed the record, however, and have found no evidence that Mickey Strickland was acting in such a capacity with regard to the transactions at issue in this case. Indeed, the evidence overwhelmingly showed the opposite -- that Mickey Strickland was an active, bona fide participant in the conspiracy.

We also reject Strickland's claim that the district court improperly precluded him from raising this theory as a defense to the conspiracy charge. We can find no indication that the district court prevented Strickland from eliciting testimony from witnesses about his cooperation. Indeed, the government itself affirmatively provided evidence of Strickland's cooperation to some degree. Moreover, the government contended that the evidence against Mickey Strickland was based exclusively upon dealing that occurred during a time when he was not cooperating. And we can find no indication in the record that Mickey Strickland attempted to argue to the jury and was denied the argument that he cooperated during the course of the conspiracy. Indeed, two other defendants, Eugene Strickland and Marshall Strickland, claimed a public authority defense, on which the jury was instructed pursuant to their requests. Mickey Strickland requested no such instruction. While the court did decline to strike testimony offered by a witness about acts for which Strickland claims that he was immune, it did so only because Strickland failed to notice of his intent to raise the defense as required by Federal Rule of Criminal Procedure 12.3. The court certainly did not preclude Strickland from testifying on his own behalf or otherwise arguing the defense. See generally 1A Charles Alan Wright, Federal Practice and Procedure§ 210 (3d ed. 1999).

We conclude that Strickland's arguments have no merit.

X

Tiffany Graham and Mitchell Kelly Chavis each challenge the findings of the district court on the amounts of drugs imputed to them for sentencing. We review these findings for clear error. See United States v. Sampson, 140 F.3d 585, 591 (4th Cir. 1998).

Under the Sentencing Guidelines, defendant's base offense level is determined by considering "all reasonably foreseeable acts and omissions of others in furtherance of the [conspiracy]." U.S.S.G. § 1B1.3(a)(1)(B). If Tiffany Graham and Mitchell Kelly Chavis' sentences were computed in this fashion, the amounts imputable to them would have been far greater. The presentence report, which the district judge accepted, held each accountable only for drugs that each of these defendants personally distributed: 14.38 kilograms of crack cocaine as to Tiffany Graham, and 6.237 kilograms of crack cocaine as to Mitchell Kelly Chavis.

A review of the record indicates that these calculations were conservative and amply supported. With respect to Tiffany Graham, Jacquelin Sainvil told investigators that she supplied Graham with a total of 14 kilograms of crack cocaine during the period from July through October 1997, and Sandra Grice estimated that she had been with Sainvil on 13 occasions when she supplied Graham with at least 1 kilogram of crack cocaine per occasion. Tyrone Whitehead admitted purchasing 13.5 ounces of crack cocaine from Graham between January and February 1997. On this evidence alone, the 14.38 kilograms calculation becomes a modest estimate.

Mitchell Kelly Chavis was involved in the conspiracy for the full 10-year period. There was specific evidence that Chavis distributed cocaine base supplied by Eugene Strickland, Marshall Strickland, and Leon Strickland on a daily basis at Mickey Strickland's mobile home for a period of approximately 220 weeks. Informants told investigators that a person selling from that location could sell as much as one ounce each day. For purposes of Chavis' calculation, the presentence report imputed only one ounce each week, or a total of 220 ounces (amounting to 6,237 grams). We conclude that this estimate is amply supported.

We have also reviewed these defendants' challenge to the sentencing enhancement for use of a firearm and find it without merit.

For the reasons given, we affirm the convictions and the sentences of each of the ten defendants in this case.

AFFIRMED

MICHAEL, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the judgment and in all but part II of the majority opinion. The broad subject of part II is whether the defendants were improperly sentenced for the drug quantities involved. On that subject this case presents only the question of whether and under what circumstances it is plain error for the jury not to be instructed on drug quantity. On that question I agree that all of the elements of plain error have not been established. I write separately because this case does not present the much more difficult question of whether and under what circumstances it is plain error for the indictment not to include drug quantity. Compare, e.g., United States v. Tran, 234 F.3d 798, 809 (2d Cir. 2000) (holding that the failure to include an element of the offense in the indictment is a jurisdictional defect), with United States v. Mojica-Baez, 229 F.3d 292, 310 (1st Cir. 2000) (holding that the failure to include an element of the offense in the indictment might not be plain error if there is sufficient evidence to establish the missing element). I do not join the majority's discussion of this question because, as the defendants ultimately concede, the indictment properly charged drug quantity. This case also does not present the question of whether drug quantity in 21 U.S.C. § 841(b) is an element of the offense or a sentencing factor. That question will be decided in our upcoming en banc decisions in United States v. Angle, 230 F.3d 113 (4th Cir. 2000), vacated and reh'g en banc granted (Jan. 17, 2001), and United States v. Promise, No. 99-4737, 2000 WL 774804 (4th Cir. June 16,

2000), vacated and reh'g en banc granted (Jan. 17, 2001). I recognize that the majority does not decide this second question, but at this point I respectfully decline to join any extended discussion or characterization of the question.

AO 2458B (Rev. 3-/95)
Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Eastern District of North Carolina - Southern Division

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Entered November 1, 1999

UNITED STATES OF AMERICA — Case Number: **7:98CR00082-002**

v.

Marshall Strickland

Joseph E. Zesztarski, Jr.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 - 2nd Sup. Indict. after a plea of not guilty.

Title & Section	Nature of Offense
21:846	Conspiracy to distribute and possess with intent to distribute cocaine

Date Offense Concluded	Count Number(s)
06/03/1999	1

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ the defendant has been found not guilty on count(s) _____

☒ Count(s) 3, & Orig. & Sup. Indicts. are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's So. Sec. No.:
579-64-1213

11/01/1999
Date of Imposition of Judgment

Defendant's Date of Birth:
11/20/1968

\s\ James C. Fox
Signature of Judicial Officer

Defendant's USM No.:
17993-056

JAMES C. FOX
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer

Defendant's Residence Address
12787 Hwy. 130 South
Maxton, NC 28364

11/01/99
Date

Defendant's Mailing Address
12787 Hwy. 130 South
Maxton, NC 28364

I certify the foregoing to be to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By: \s\ _____
Deputy Clerk

DEFENDANT: Marshall Strickland
CASE NUMBER: 7:98CR00082-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **400 month(s).**

☐ The court makes the following recommendation to the Bureau of Prisons

☒ The defendant is remanded to the custody of the United States Marshal:

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at a.m./p.m. on
- ☐ as notified by the United States Marshal

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

DEFENDANT: Marshall Strickland
CASE NUMBER: 7:98CR00082-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the special conditions on the Special Conditions of Supervision Page.

See Special Conditions of Supervision -- Page 4

STANDARD CONDITIONS OF RELEASE

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

DEFENDANT: Marshall Strickland
CASE NUMBER: 7:98CR00082-002

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall to consent to a warrentless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall submit to a urinalysis test within 15 days of release from imprisonment, ant at least two urinalysis tests thereafter, as directed by the probation officer pursuant to 18:3608.

DEFENDANT: Marshall Strickland
CASE NUMBER: 7:98CR00082-002

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$100.00**	**$15,000.00**	**$[Restitution (no $)]**

☐ If applicable, restitution amount ordered pursuant to plea agreement

FINE

The above fine includes costs of incarceration and/or supervision in the amount of _____.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C § 3612(g).

☒ The court has determined that the defendant does not have to ability to pay interest and it is ordered that:

- ☒ The interest requirement is waived.
- ☐ The requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution on the following payees in the amounts listed below. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless other wise in the priority order or percentage payment column below.

Name & Mailing Address of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order of Percentage of Payment
Totals:	$0.00	$0.00	

** Findings for the total amount of losses are required under Chapters 109A, 110, 100A , and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Marshall Strickland
CASE NUMBER: 7:98CR00082-002

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. ☒ in full immediately; or

B. ☐ $____ immediately, balance due [in accordance with C, D, or E]; or

C. ☐ not later than _____; or

D. ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court establish a payment schedule if appropriate; or

E. ☐ in _____ installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties payments are to be made to the United States District Court, Eastern District of North Carolina, Post Office Box 198559, Atlanta, Georgia 30384, except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program.

DEFENDANT: Marshall Strickland
CASE NUMBER: 7:98CR00082-002

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The Court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary):
See Additional Factual Findings and Guideline Application Exceptions - Page 8

Guideline Range Determined by the Court:

Total Offense Level:	**42**
Criminal History Category:	**II**
Imprisonment Range:	**360 mos. to Life**
Supervised Release Range:	**5 years**
Fine Range:	**$25,000.00 to $25,000.00**

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☒ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii)

☐ For offenses committed on or after September 13, 1994, but before April 23, 1996 that require a total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payments of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that exceeds 24 months, and the sentence is imposed for the following reasons:
The court imposes a sentence it feels is appropriate due to the defendant's conduct in the course of the trial.

OR

☐ The sentence departs from the guideline range:
- ☐ upon motion of the government, as a result of defendant's substantial assistance.
- ☐ for the following specific reasons:

DEFENDANT: Marshall Strickland
CASE NUMBER: 7:98CR00082-002

ADDITIONAL FINDINGS AND GUIDELINE APPLICATIONS EXCEPTIONS

The court finds that the adjustment for role in the offense should be 2 instead of 4 thereby find a offense level of 42 instead of 43.

DEFENDANT: Marshall Strickland
CASE NUMBER: 7:98CR00082-002

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 118, 1988)

FOR DRUG TRAFFICKING PURSUANT TO 21 U.S.C. §862(A)

IT IS ORDERED that the defendant shall be:

☒ ineligible for all federal benefits for a period of 5 years.

☐ ineligible for the following federal benefits for a period of _____. (specify benefit(s))

OR

☐ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED THAT the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall be:

☐ ineligible for all federal benefits for a period of ____.

☐ ineligible for the following federal benefits for a period of _____. (specify benefit(s))

☐ successfully complete a drug treatment program.

☐ perform community service, as specified in the probation and supervised release portion of this judgment.

☐ Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk of court is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed: April 30, 2001
Entered: April 30, 2001

No. 99-4855
Cr-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EUGENE STRICKLAND,
Defendant-Appellant.

No. 99-4856
Cr-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARSHALL STRICKLAND,
Defendant-Appellant.

No. 99-4857
Cr-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.
TIFFANY GRAHAM
Defendant-Appellant.

No. 99-4858
CR-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EMILY CHARITY CHAVIS, a/k/a Pooh,
Defendant-Appellant.

No. 99-4859
CR-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICKEY STRICKLAND,
Defendant-Appellant.

No. 99-4860
CR-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT M. STRICKLAND, a/k/a Punch,
Defendant-Appellant.

No. 99-4861
CR-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEON STRICKLAND,
Defendant-Appellant.

No. 99-4862
CR-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MITCHELL KELLY CHAVIS,
Defendant-Appellant.

No. 99-4863
CR-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TRAVIS STRICKLAND,
Defendant-Appellant.

No. 99-4864
CR-98-82

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PATRICIA MCGIRT,
Defendant-Appellant.

On Petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc; and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
CLERK

Section 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving -

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title

after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving -

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of

such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not

to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits

such a violation after a prior conviction for felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or

$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed -

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use -

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution. -

(A) In general. - Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition. - For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Repealed. Pub. L. 98-473, title II, Sec. 224(a)(2), formerly Sec. 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, Sec. 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally -

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties. It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the Judges; the other is you, the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It also is my duty at the end of the trial to instruct you on the law applicable to the case.

You, as Jurors, are the judges of the facts. In determining what actually happened in this case -- that is, in reaching your decision as to the facts -- it is your sworn duty to follow the law I am now in the process of defining for you.

You must follow all of my instructions as a whole. You may not disregard or give special attention to any one instruction, or question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences. By the same token it also is your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

Now members of the jury, an indictment or formal charge against the Defendants is not evidence of guilt. Indeed, the Defendants are presumed by the law to be innocent. The law does not require the Defendants to prove their innocence or produce any evidence at all. The Government has the burden of proving the Defendants's guilt beyond a reasonable doubt, and if it fails to do so you must find the Defendants not guilty. Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendants's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendants's guilt. The Defendants are not to be convicted on mere suspicion or conjecture.

I remind you that the burden of proof never shifts to the Defendants; for the law never imposes upon the Defendants in a criminal case the burden or duty of calling any witnesses or producing any evidence on their own behalf. No inference of any kind may be drawn from the Defendants's election not to present witnesses or evidence or to testify on their own behalf.

In summary, unless the Government proves beyond a reasonable doubt that the Defendants have committed every element of the offenses with which they have been charged, you must find the Defendants not guilty of those offenses. As you know, there are ten Defendants in this case being tried together. I instruct you that you must be careful to give separate consideration to the evidence supporting or refuting each charge against each separate Defendant. In considering each Defendant separately, do not think of the ten Defendants as a group or assume that because one Defendant may be found guilty of a particular charge that another must also be guilty. Instead, you should only return a verdict of guilty on any charge if the evidence proves all of the elements of that particular charge, against that individual Defendant, beyond a reasonable doubt.

Furthermore, members of the jury, you must conduct your duty of finding facts without bias or prejudice as to any party. You are to perform your final duty in an attitude of complete fairness and impartiality. This case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, it is important to the Defendant, who is charged with a serious crime. The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to litigation. By the same token, it is entitled to no less consideration. All parties, whether the government or individuals, stand as equals at the bar of justice.

Evidence

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witness and the exhibits admitted in the record.

Remember that any statements or arguments made by the lawyers are for the purpose of pointing out those things that are most significant or most helpful to their side of the case and, in so doing, of calling your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you. Also, during the course of the trial, I occasionally may have made comments to the lawyers, or have asked questions of a witness, or have admonished a witness concerning the manner in which he should respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in he light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You also may consider either direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating either the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weight all of the evidence and be convinced of the Defendants's guilt beyond a reasonable doubt before they can be convicted.

Also, you are instructed that evidence that certain Defendants bribed or attempted to bribe a witness is a circumstance that, if proven, may be considered by you as showing a consciousness of guilt on the part of those certain Defendants only.

Witnesses

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider the witness's relationship to the Government or a defendant; the witness's interest, if any, in the outcome of the case; the witness's manner of testifying; the witness's opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the witness's candor, fairness and

intelligence; and the extent to which the witness has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

The law does not require the Government to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the Government to produce as exhibits all papers and things mentioned in the evidence.

However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of all evidence that has been produced, you may consider the Government's failure to call witnesses or to produce other evidence shown by the evidence in the case to be in existence and available. You must bear in mind always, however, that the law never imposes upon any Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence, and no adverse inferences may be drawn from a Defendant's decision not to do so.

In this case, the Government called as witnesses some of the alleged accomplices, named as co-defendants in the indictment or as co-conspirators of the Defendants on trial here, with whom the Government has entered into plea agreements. In these plea agreements, the Government has indicated it may recommend the dismissal of some charges and the imposition of a lesser sentence than the alleged accomplice otherwise would be exposed to, in exchange for the alleged accomplice's complete and truthful statement. Such plea bargaining, as it's called, has been approved as lawful and proper, and is expressly provided for in the rules

of this court. You are instructed regarding these accomplices and co-conspirators that in the State of North Carolina, there is no statute of limitations barring the prosecution of felony offenses. You may consider that factor in weighing the credibility of the testimony of such accomplices and co-conspirators.

An alleged accomplice, including one who has entered into a plea agreement with the Government, does not thereby become incompetent as a witness. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. However, the jury should keep in mind that such testimony always is to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt.

Also, regarding the testimony of alleged accomplishes and co-conspirators, you are instructed that the fact that an accomplice has entered a plea of guilty to an offense is not evidence, in and of itself, of the guilt of any other person.

You have heard the testimony of informants working with the Government to investigate the Defendants. There is nothing improper or illegal about the Government using informants. Indeed, certain types of evidence would be extremely difficult to detect without the use of informants. Whether you approve of the use of an informant to detect unlawful activities is not to enter into your deliberations in any way.

Furthermore, the testimony of one who is shown to have used addictive drugs during the period of time about which he testified must always be examined and weighed by you with greater care and caution than the testimony of ordinary witnesses. It is proper to call such a witness to testify about events within his personal knowledge. However the use of addictive drugs may affect a witnesses ability to perceive or relate the events in question. You

should not convict any Defendant upon the unsupported testimony of a witness who used addictive drugs during the period of time about which he testified unless you believe that testimony beyond a reasonable doubt.

You have heard the testimony of witnesses who were previously convicted of a crime punishable by more than one year in jail or a crime involving dishonesty or false statement. These prior convictions were brought out for you to consider in evaluating the credibility of these witnesses. The fact that a witness has previously been convicted of such a crime does not necessarily destroy the witness's credibility; but it is one of the circumstances you may consider in deciding how much of the witness's testimony to accept and what weight, if any, it should be given.

You have heard the testimony of various law enforcement officials. The fact that a witness may be employed by the federal government as a law enforcement official does not, at all, mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. At the same time, it is quite legitimate for a defense attorney to attack the credibility of law enforcement witnesses on the ground that their testimony may be colored by a personal or professional interest in the outcome of this case. It is your decision, after reviewing all of the evidence, whether to accept the testimony of the law enforcement witness and to give that testimony whatever, weight if any, you find it deserves. The mere fact that a person is a law enforcement officer does not allow you to give his or her testimony any more credence or believability than you would any other witness.

Also, the rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and

state his opinion concerning such matters. You should consider such opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that such opinion is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

Some of the Defendants have not testified in this case. Under our Constitution, a Defendant has no obligation to testify or to present any other evidence because it is the Government's burden to prove a Defendant's guilt beyond a reasonable doubt. You may not attach any significance to the fact that a Defendant's guilt beyond a reasonable doubt. The Defendant, Tiffany Graham, did testify in this case. You should judge the testimony of Tiffany Graham in the same manner as you judge the testimony of any other witness in this case.

Now, a witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

You also have heard evidence that a witness made a statement on an earlier occasion that counsel argues is inconsistent with the testimony given during this trial. Evidence of a prior inconsistent statement may be considered by you for the purpose of deciding whether to believe the trial testimony of the witness who contradicted himself or herself. If you find that the witness has made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

Now, members of the jury, each Defendant has been charged with an offense or offenses in a document called an indictment, to which some reference has been made during the course of this trial. As I have mentioned earlier, the indictment itself is not evidence; it is merely a formal charge against the Defendants. Each Defendant has pleaded "not guilty" to the charges against him or her contained in the indictment. Such plea puts into issue each of elements of the offense or offenses as I will describe them to you, and imposes on the Government the burden of establishing each of the elements of the offense or offenses by proof beyond a reasonable doubt.

You will note that the indictment charges in each count that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty that exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

I will now explain to you the law governing the substantive offenses.

Count One of the indictment charges that from in or about 1989, and continuing through and including the date of the Indictment, in the Eastern District of North Carolina and elsewhere, the defendants, Eugene Strickland, Marshall Strickland, Tiffany Graham, Leon Strickland, Emily Charity Chavis (a/k/a Pooh), Patricia McGirt, Mickey Strickland, Mitchell Kelly Chavis, Robert Strickland (a/k/a Punch), and Travis Strickland, along with others, unlawfully and knowingly combined and conspired to commit the unlawful act of distributing and possessing with intent to distribute cocaine and cocaine base or "crack" in violation of Title 21, United States Code Section 841(a)(1) and 846.

Title 21, United States Code, Section 846 makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually

carried out, would be a violation of Section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly possess cocaine and cocaine base, commonly known as "crack," with the intent to distribute those drugs.

Under the law, a "conspiracy" is an agreement or a kind of "partnership in criminal purpose" in which each member becomes the agent or partner of every other member. In order to establish a conspiracy offense, it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme, or that those who were members had entered into any formal type of agreement. Also, because the essence of a conspiracy offense is the making of a scheme itself, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and

Second: That the Defendants knowingly became members of such a conspiracy. A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all the other alleged conspirators. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he had not participated before and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way that advances some purpose of one, does not thereby become a conspirator.

The fact that a Defendant is related by blood to a person who has been involved in drug transactions, in and of itself, is no evidence that the Defendant knowingly participated in a drug conspiracy or knowingly possessed illegal drugs with intent to distribute them. If you find that a Defendant is merely related to a person who has been involved in drug transactions with nothing more, you must find the Defendant not guilty.

Furthermore, in order to sustain its burden of proof for this charge, the Government must show that the *single, overall* conspiracy alleged in Count One of the indictment existed. Proof of separate, smaller or independent conspiracies is not sufficient. In determining whether any single conspiracy has been shown by the evidence in the case, you must decide whether common or overall goals or objectives existed which served as the focal point for the efforts and actions of any members to the agreement. In arriving at this decision, you may consider the length of time the alleged conspiracy existed, the mutual dependence or assistance between various persons alleged to have been its members, and the complexity of the goals or objectives shown.

A single conspiracy may involve various people at different levels and may involve numerous transactions which are conducted over some period of time and at various places. In order to establish a single conspiracy, the government need not prove that an alleged co-conspirator knew each of the other alleged members of the conspiracy

nor need it establish that an alleged co-conspirator was aware of each of the transactions alleged in the indictment. However, even if the evidence in the case shows that a Defendant was a member of some conspiracy, but that this conspiracy is not the single conspiracy charged in the indictment, you must find the Defendant not guilty of conspiracy.

It also must be noted that one does not automatically become a conspirator by being a buyer or seller of drugs. A buyer-seller relationship, standing alone, does not establish the existence of a conspiracy. While a buyer-seller relationship, coupled with the involvement of a substantial quantity of drugs, may support the inference of the existence of a conspiracy, the burden still is upon the Government, by proof beyond a reasonable doubt, to show that a Defendant knowingly entered the conspiratorial agreement alleged in the Indictment to distribute and possess with intent to distribute illegal drugs.

Now, again, Count One of the indictment charges that the Defendants conspired to distribute and possess with the intent to distribute controlled substances.

The term "to possess" as used in these instructions means to exercise control of authority over something at a given time. There are several types of possession -- actual, constructive, sole and joint. "Possession" is considered to be actual possession when a person knowingly has direct physical control of authority over something. The "possession" is called constructive possession when a person does not have direct physical control over something, but can knowingly control it and intends to control it, sometimes through another person. The "possession" may be knowingly exercised by one person exclusively which is called sole possession or the "possession" may be knowingly exercised jointly when it is shared by two or more persons.

The term "to distribute" as used in these instructions, means to deliver or to transfer possession or control of something from one person to another. The term "to distribute" includes the sale of something by one person to another.

The phrase "with intent to distribute" means to have in mind or to plan in some way to deliver or to transfer possession or control over a thing to someone else. In attempting to determine the intent of any person you may take into your consideration all the facts and circumstances shown by the evidence received in the case concerning that person. In determining a person's "intent to distribute" controlled substances, you may consider, among other things, the purity of the controlled substance, the quantity of the controlled substance, the presence of equipment used in the processing or sale of controlled substances, and large amounts of cash or weapons.

Now, the crime charged in Count One of the indictment requires proof of specific intent. To establish that specific intent in this case, the Government must prove that each Defendant *knowingly* did an act which the law forbids, purposely intending to violate the law. The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident. Such intent may be determined from all the facts and circumstances surrounding the case. Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his or her state of mind. You may consider it reasonable to draw the inference and find that a person intends the

natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Now members of the jury, Count Four of the indictment charges that in or about November, 1996, in the Eastern District of North Carolina, the Defendant, Eugene Strickland, during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States-that is, conspiracy to distribute and possess with the intent to distribute cocaine and cocaine base or "crack"-did use or carry a firearm in violation of the provisions of Title 18, United States Code, Section 924(c)(1).

Count Five of the indictment charges that on or about June 5, 1998, in the Eastern District of North Carolina, the Defendant, Travis Strickland, during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States-that is, conspiracy to distribute and possess with the intent to distribute cocaine and cocaine base or "crack"-did use or carry a firearm in violation of the provisions of Title 18, United States Code, Section 924(c)(1).

Section 924(c)(1) of Title 18 United States Code provides, in pertinent part, that "any person who, during and in relation to any. . . drug trafficking crime. . . for which the person may be prosecuted in a court of the United States,. . . carries a firearm" shall be guilty of an offense against the United States.

In order to sustain its burden of proof for the crime of carrying a firearm during and in relation to a drug trafficking crime, the Government must prove the following essential elements beyond a reasonable doubt:

First: The Defendant committed a drug trafficking crime, and;

Second: that during and in relation to the commission of that crime, the Defendant knowingly carried a firearm.

The offense of conspiring to distribute or possess with the intent to distribute cocaine and cocaine base, in violation of Title 21, United States Code, sections 841 and 846, as charged in Count One of the Indictment in this case, is a drug trafficking crime.

A "firearm" is any weapon which will or is designed to or may be readily converted to expel a projectile by the action of explosive.

In order to prove that the Defendant "carried" the firearm, the Government must prove beyond a reasonable doubt that the Defendant did knowingly possess and bear, move, convey, or transport the firearm in some manner. Furthermore, the Government must prove that the Defendant had the weapon within his control in such a way that it furthered the commission of a drug trafficking crime, or was an integral part of the commission of the crime. The Defendant does not necessarily have to hold the firearm physically, that is, have actual possession of it on his person. If you find that the Defendant had dominion and control over the place where the firearm was located, and had the power and intention to exercise control over the firearm in such a way that it furthered the commission of a drug trafficking crime, you may find that the Government has proved that the Defendant carried a firearm.

Public Authority Defense

Now members of the jury, the Defendants, Eugene and Marshall Strickland, through counsel, have elicited testimony that at certain times and on certain occasions they agreed to work on behalf of the Robeson County Sheriff's Department and the federal Drug Enforcement Administration. Counsel for the Government have elicited testimony that at certain times and on certain occasions during the time period alleged in the indictment, Eugene and Marshall Strickland were not so employed when they allegedly conspired to distribute and possess with the intent to distribute controlled substances. If a person enters into

an unlawful agreement or conspiracy at the request of a Government law enforcement officer, with the reasonable belief that he is acting as an authorized Government agent to assist in law enforcement activity, then that person may not be convinced of conspiracy by virtue of such agreement because the requisite criminal intent on the part of the Defendant is lacking.

In order for you to find Eugene or Marshall Strickland guilty of Count One of the Indictment, you must find beyond a reasonable doubt that the Defendant under your consideration agreed or conspired with some other person to further the conspiracy alleged in Count One of the indictment to possess or possess with intent to distribute cocaine or cocaine base ("crack") *without such agreement regarding possession or distribution having been directed or authorized by a person or persons with lawful authority to assert such direction or authorization.* If you find that Eugene or Marshall Strickland so agreed or conspired to possess or possess with the intent to distribute controlled substances, but only at the direction of a person or persons with lawful authority to authorize or direct the making of such agreement, then you must find that Defendant not guilty of Count One of the Indictment.

Concluding Remarks

Now, I caution you, members of the Jury, that you are here to determine the guilt or innocence of each Defendant from the evidence in this case. The Defendants are not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a Defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court on judge, and should never be considered by you in any way, in arriving at an impartial verdict as to the guilt or innocence of the Defendants.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors, to consult with one another, and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.